90-785

No.



IN THE

# Supreme Court of the United States

## OCTOBER TERM, 1990

STANLEY SIMON,

*Petitioner,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## Corrected Petition for a Writ of Certiorari

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(5424)

## QUESTIONS PRESENTED

Whether it is a violation of the joinder requirements of F.R.C.P. 8(b) to charge multiple defendants with three independent and different schemes in which not all the defendants are involved for the purpose of proving the criminal character of one of the defendants?

Whether it is proper for a court to charge a jury that they may infer guilt of extortion from the mere acceptance by an elected official of campaign contributions?

Whether it is proper to permit a conviction to stand based upon false and perjured testimony?

Whether a conviction by a trial jury based upon proof not presented to the grand jury constitutes an unconstitutional amendment of the indictment?

**PARTIES**

All of the parties to the proceeding in the United States Court of Appeals for the Second Circuit were the petitioner, Stanley Simon, Mario Biaggi, Richard Biaggi, Peter Neglia, Jchn Mariotta and Bernard Erlich. None of the latter five are interested in this proceeding.

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## PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

A copy of the opinion of the United States Court of Appeals for the Second Circuit, decided June 29, 1990 is annexed hereto as an appendix. Also annexed as an appendix is an order of the United States Court of Appeals for the Second Circuit, dated July 30, 1990, which denied petitioner's petition for a rehearing. Also annexed as appendices are two opinions of the

District Court dated respectively October 23, 1987 (672 F.Supp. 112) and June 27, 1988 (705 F.Supp. 830).

**JURISDICTION**

(a) The judgment of conviction was rendered November 18, 1988, convicting petitioner of engaging in a pattern of racketeering activity in violation of 28 U.S.C. Section 1961, 1962(c) and 1963(a), (Count 1) conspiracy to violate the RICO statute, 18 U.S.C. Section 1962(d) and 1963(a) (Count 2), three counts of extortion in violation of 18 U.S.C. Section 1951(b)(2) and (3) (Count 19, 20 and 21), one count of perjury in violation of 18 U.S.C. Section 1623 (Count 22) and one count of evasion of income tax in violation of 26 U.S.C. Section 7201 (Count 23), after a trial by jury on a fourth superceding indictment.

(b) The judgment of affirmance of the United States Court of Appeals for the

Second Circuit is dated June 29, 1990 and was entered June 29, 1990.

(c) The order of the United States Court of Appeals for the Second Circuit denying the petition for rehearing is dated July 30, 1990 and was entered July 30, 1990.

(d) Jurisdiction to review the judgment in question by certiorari is conferred by Title 28 U.S.C. Section 1254(1).

## CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Amendment V; Title 18 U.S.C. Section 1961, Title 18 U.S.C. Section 1962 Subdivision (c) and (d), Title 18 Section 1963 Subdivision (a) Title 18 U.S.C. 1951 Subdivision b(2) and (3); Title 18 U.S.C. Section 1623; Title 26 U.S.C. Section 7201 Subdivision 1; Federal Rules of Criminal Procedure 8 (a) and (b); Federal Rules of Criminal Procedure 52 (a).

## STATEMENT OF THE CASE

The Petitioner was tried and convicted of three separate and unrelated charges of racketeering, extortion and income tax evasion.

The claim of the government was that the defendants transformed Wedtech Corporation ("Wedtech") into a racketeering enterprise for the purpose of generating for themselves bribes and kickbacks.

In addition Simon was charged with extorting kickbacks from his employee and with failing to report as income the value of services received from a contractor. Neither of these incidents had anything to do with Wedtech.

The racketeering acts attributed to Simon appeared in the indictment as racketeering Acts Nos. 3, 4 and 16.

Racketeering Act 3 charged that Simon, through extortion, allegedly secured from

Wedtech the hiring of any pay raises for Henry Bittman, Mr. Simon's former brother-in-law.

Racketeering Act 4 charged that starting in "mid-1984" Simon allegedly demanded and received, again through the use of extortionate means, $50,000 from representatives of Wedtech in the form of cash, contributions and payment of expenses.

Racketeering Act 16 relates to the first two: it is claimed that Simon obstructed justice by denying to a federal grand jury he appeared before in February , 1986 -- which was conducting a wholly unrelated to Wedtech investigation -- that he ever received benefits from anyone in connection with his duties as Bronx Borough President or as City Councilman.

The indictment also included non-RICO allegations of extortion and tax evasion. There was no claim by the government that

these acts were part of, or related to, the Wedtech matter.

**The Non-RICO Charges**

The first non-RICO allegation involved the claimed extortion of Ralph Lawrence, a former employee of Simon. Lawrence allegedly paid to Simon salary kickbacks over a three year period totaling $14,000. This was charged in count 21 as a separate Hobbs Act violation.

In addition Simon was charged with obtaining for his family home from Sabino Fogliano, a Westchester building contractor, a tile floor valued at $9,000. This charge was used, along with the Wedtech and Lawrence counts, to support the indictments tax evasion (count 23) and perjury (charge 22) charges.

Simon's failure to report on his 1985 income taxes monies or income alleged to have been received from Lawrence ($14,000) and

Fogliano ($9,000) constituted the alleged tax evasion; his failure to tell the grand jury about them, the perjury.

Simon opposed the inclusion of the unrelated-to-Wedtech Lawrence and Fogliano charges, in a multiple-defendant case which was focused primarily on the doings of Wedtech. Simon's Rule 8(b) severance motion was denied by Judge Motley.

Both Lawrence and Fogliano testified on behalf of the government.

Lawrence testified that he was forced to kickback to Simon a portion of his salary; $14,000 in all over 3 1/2 years. Lawrence admitted under cross-examination that many of the "payments" related to payment for meals eaten by Lawrence and Simon.

Fogliano testified that he made some renovations to the Simon home but failed to finish the job. He stated that he did not bill Simon for the work because Simon had

received a great deal of publicity at the time and Fogliano did not want to get involved.

Fogliano did not want to get involved since he himself was in deep trouble. He had failed to report 8.5 million dollars in income over a four year period.

Fogliano testified at the trial of this action that he had only evaded payment on $600,000 - $800,000 of income. After the trial he plead guilty in New York State Court of evading income exceeding $8.5 million; it was described by the State prosecutors as one of the largest income tax evasions by a single individual in New York State history.

Significant circumstantial evidence pointed to the fact that government prosecutors had knowledge of the true extent of Fogliano's evasion and they permitted him to offer the false testimony so that they could describe Fogliano to the jury as a

"small businessman" who was extorted by Simon.

Simon's application for a new trial, or in the alternative, a hearing to determine if the government's attorneys knew of the out-and-out perjury at the time Fogliano took the witness stand, was denied.

**The RICO Charges**

The indictment alleged that commencing in "mid-1984" Simon extorted cash, contributions and payment of expenses in exchange for the use of Simon's influence as the Bronx Borough President.

The basis for the allegation was a claimed meeting between Simon and representatives of Wedtech which took place on June 20, 1984 at the Yonkers's Raceway at a charity benefit for the Hebrew Home for the Aged at Riverdale.

At the raceway meeting Simon allegedly agreed to accept $50,000 in exchange for a

vote of approval by Simon on a matter pending before the New York City Board Estimate involving Wedtech.

Wedtech needed the approval of the Board of Estimate to lease city owned property known as One Loop Drive in the Bronx that had access to the Bronx waterfront.

It was claimed that the lease was vital to Wedtech's securing a contract with the United States Navy, worth millions of dollars, to construct and assemble floating pontoons. Simon, the Bronx representative on the Board of Estimate controlled the award of the lease to Wedtech. The Board of Estimate approved the One Loop Drive lease on July 12, 1984.

In fact the event at Yonkers's Raceway did not take place until November 14, 1984. By then Simon was functus officio with respect to the Loop Drive lease after the vote in July at the Board of Estimate. Simon

simply could not have been involved in a bribe or extortion since the act claimed to have been performed as a benefit to the actor had been performed prior to the bribe or extortion.

Faced with irrefutable evidence the government conceded that the meeting at which Simon allegedly demanded a pay-off did not occur in "mid-1984" and "probably" occurred in November, 1984.

The grand jury, however was not presented with evidence of a November meeting. Nevertheless, the government argued to the jury that they could convict Simon based upon a meeting that "probably" happened in November.

**The Improper Jury Charge**

It was part of the government's case that some of the funds allegedly extorted by Simon from Wedtech were directed to Simon's re-election campaign.

The trial Judge charged the jury that they could convict Simon if they found that he repeatedly accepted money from representatives of Wedtech, or if the amount of money received could reasonably have affected the exercise of Simon's duties.

Simon, through his attorney specifically objected to this charge. He noted that it permitted the jury to infer guilt based simply upon the receipt of campaign contributions.

## REASONS FOR GRANTING THE WRIT

### I

### THE IMPROPER JOINDER DENIED PETITIONER HIS FUNDAMENTAL RIGHT TO BE TRIED FREE FROM IMPERMISSIBLE PREJUDICE

It has long been recognized by this Court that joint trial of charges against several accused when they are not for the same act or transaction, or for connected acts or transactions, or provable by the same evidence, is prejudicial. McKlroy v. United

States, 164 U.S. 76, 41 L.Ed. 355, 17 S.Ct. 31 (1896).

Even in the absence of prejudice it is abundantly clear that prior to trial a court must grant a severance upon a finding that Rule 8(b) standards have not been met. United States v. Lane, 474 U.S. 438, 88 L.Ed. 814, 106 S.Ct. 725, (1986).

Petitioner's pre-trial motion for severance was erroneously denied upon Judge Motley's decision that Rule 8(a), not Rule 8(b), governed and that the Lawrence and Fogliano counts were of "the same or similar character" as the Wedtech extortion counts. United States v. Biaggi, 672 F.Supp. 112 (S.D.N.Y. 1987).

Simon renewed his motion for severance under Rule 8(b) after the Court of Appeals for the Second Circuit decided the case of United States v. Turoff, 853 F.2d 1037 (2nd Cir. 1988) which held that claim for

severance of counts in a multi-defendant case are to be governed by the standards of Rule 8(b). Judge Motley denied the motion; United States v. Biaggi, 705 F.Supp 852 (S.D.N.Y. 1988).

The inclusion of the Lawrence and Fogliano charges, totally unrelated to the RICO counts and to each other, gave the prosecution the oft-condemned but much sought after "inference of criminality". Lawrence testified for hours about matters having nothing to do with Wedtech, including trips to Israel, Italy and San Francisco with appellant and his wife, as well as theater ticket purchases, cash expenditures for Atlantic City, bills at famous restaurants and the like. Fogliano testified similarly.

The Assistant United States Attorney mounted his summation against Simon on the very prejudice that Rule 8(b) was designed to

prevent when he improperly linked the disparate charges and Defendants. He stated:

> "Let's turn now to Stanley Simon. The proof on Stanley Simon shows that he takes. He seems to be on the prowl for cash, something for himself somehow. Whether it is Fogliano, whether it is Lawrence, whether it is Wedtech, the evidence from Moreno, Neuberger, Lewis as to Wedtech and Lawrence and Fogliano all shows the same thing. Mr. Simon uses the government to get things."
>
> * * *
>
> "Like the other public officials here, he just doesn't view a public salary as being enough. He wants more and he's got a job which gives you the chance to get some more. There are always people who want to deal with public officials and so you can get it you just ask right and you push right and you demand right.
>
> Ralph Lawrence is really a key to understanding Stanley Simon in this case. He tells you what he's all about. What do you say about a public official who takes money from his aide like that? Who treats him like that. What do you say? How do you figure that out?
>
> If you take the simplest items, $400 for a dinner for the bosses' family. Public servant.

> Forget the cash. It's absurd. It's obscene that he could do that.
>
> His testimony, Fogliano's testimony, the Wedtech officials' testimony all tell you the same thing.
>
> We have had independent witnesses not connected with the Wedtech officers ... You had Ralph Lawrence, Sabino Fogliano. They were not Wedtech officers either. The witnesses tell the story, they are corroborated by independent witnesses." (emphasis supplied)

By hammering home in its closing arguments the unfair inference of habitual criminality, the government deprived Petitioner of his Fifth Amendment Right to a fair trial.

The Court of Appeals overlooked or misapprehended the relationship of Lawrence and Simon in dealing with the misjoinder issue. The court simply concluded that Petitioner's alleged demand to receive benefits from Lawrence "was inextricably related to his extortion of Wedtech. Proof

of one scheme was helpful to a full understanding of the other".

The only help was in establishing the government's claim that Simon was a "taker". There is no other conceivable connection.

The Court of Appeals satisfied itself that the connection was made by an allegation that Lawrence once carried on envelope from a representative of Wedtech to Simon, which envelope it is claimed contained cash.

What the Court of Appeals misapprehended was that it was part of Lawrence's job to run errands for the Borough President. That he may have received an envelope from a representative of Wedtech would not in any conceivable fashion help understand whether Simon requested funds or payments for his help on the Loop Drive lease by his vote in July, 1984; nor would extortion of Wedtech help understand whether Simon demanded kickbacks from Lawrence.

The Court's conclusion that proof of one scheme was helpful to a full understanding of the other had no basis except in the overblown arguments of the prosecution; there were no facts to support it.

None of the reasoning of the Court of Appeals on misjoinder applies to the alleged Fogliano illegality, which was only a failure to report $9,000 worth of kitchen work as income. That had nothing to do with either the claimed Wedtech scheme or the alleged Lawrence scheme. In fact the example given by the Court of Appeals demonstrates how erroneous the joinder was. The Court said:

> "We would have a very different case if the Government had sought to join several defendants who all extorted benefits from Fogliano and then joined a tax count that charged Simon with evading taxes no only on income from Fogliano but also on income extorted from Wedtech."

The fact is that the illustration is precisely what this case is all about if one

merely interchanges the names of Fogliano and Wedtech where they appear. We would then have:

> "If the Government had sought to join several defendants who all extorted benefits from Wedtech and then joined a tax count that charged Simon with evading taxes not only on income from Wedtech but also on income extorted from Fogliano."

Under the example, as the Court of Appeals indicated, the joinder was wrong.

The misjoinder was not a harmless error which may be disregarded pursuant to Rule 52(a). As set forth by this Court in Kotteakos v. United States, 328 U.S. 750 (1946):

> "The inquiry cannot be merely whether there was enough to support the result apart from the phase affected by error. It is rather, even so, whether the error itself had substantial influence. If so, or if one if left in grave doubt, the conviction cannot stand." 328 U.S. supra at 763, 764 765.

The lumping of the Lawrence and Fogliano charges with the remainder of this mega-

indictment gave the prosecution the ability to get maximum mileage out of the "inference of habitual criminality"; and it made Simon's defense (although already difficult in a multiple defendant RICO setting) a virtual impossibility.

This case presents a classic and vivid example of the cummulative prejudice which Rule 8 was designed to prohibit. The denial of Simon's constitutional right to a fair trial free of such prejudice mandates a reversal of his conviction and a new trial.

## II

## JUDGE MOTLEY'S JURY CHARGE WOULD PERMIT THE CONVICTION FOR EXTORTION OF EVERY ELECTED OFFICIAL IN THE UNITED STATES

Simon testified that Wedtech had promised him political contributions towards his next campaign. Any benefit he received, he claimed, was received from Wedtech in that state of mind.

The government claimed that the benefits Simon received from Wedtech were the result of a promise made in advance of a favorable vote. The promise was allegedly made at a time the evidence showed the vote had already been taken.

The charge, therefore, had to be exact and complete.

Over objection, the Court charged:

> "[I]f the defendant repeatedly accepted money or benefits from representatives of Wedtech, and if the amount of money or the benefits accepted could reasonably have affected the defendant's exercise of his duties, then you may find that the defendant 'induced' the payment of money.
>
> On the other hand, a mere acceptance by the defendants of small amounts of money or benefits that could not reasonably be expected to affect the exercise of their duties from representatives of Wedtech, without more, does not amount to 'inducement' under the statute."

The charge would convict every elected public official who received a substantial

campaign contribution and thereafter was required to consider a problem involving the donor. There was significant testimony that Wedtech gave large amounts of money and benefits to politicians of political parties throughout New York City and New York State and even the United States.

There was evidence that Senator D'Amato and Mayor Koch accepted funds from Wedtech officials.

The government argued that the charge was proper and was authorized by the decision of the Second Circuit in the case of U.S. v. O'Grady, 724 F.2d 642, 687 (2 Cir. 1984, en banc).

O'Grady, however, did not deal with an elected official who seeks and often obtains, without request, campaign contributions. The governments argument was that the mere receipt of substantial benefits by a candidate, in office, could be deemed to be

the equivalent of an inducement for purposes of extortion.

Upon review of this case the Second Circuit held that the "pattern of benefits" language used by Judge Motley was improper. However, the Court then stated that the issues framed by the parties contention's did not contemplate the contributions to Simon's re-election campaign. That was not the case.

The factual issues as framed by the parties were whether the payments concededly made in furtherance of Simon's campaign were extorted by fear of Simon's vote or were voluntary offered contributions.

The jury was diverted from the issues by the use of the O'Grady standard which permits an inference of inducement from repeated acceptance of substantial benefits. Thus, it made no difference to the jury whether an extortionate demand, as charged, was made or not. The repeated acceptance of benefits

under the O'Grady test is what convicted Simon, a test that "does not apply, however, to an elected official who may lawfully receive campaign contributions". There was never a doubt that Simon was lawfully entitled to receive campaign contributions.

The judge's charge calls into question every campaign contribution made to every office holder who sought re-election and then acted on matters affecting the donor.

## III

## A NEW TRIAL SHOULD HAVE BEEN GRANTED WHEN FOGLIANO'S PERJURY WAS DISCOVERED

Fogliano lied about his tax evasion when he testified in May, 1988. The lie was discovered by Simon's attorneys months after the conclusion of the trial, when Fogliano pled guilty on October 13, 1988, in New York State courts to evading income taxes exceeding $8.5 million.

Every judge and every lawyer who has ever tried a criminal case is aware of the rule that a Defendant is entitled to a new trial when perjured testimony, known or ought to have been known by the government, raises "a reasonable likelihood that the false testimony could have affected the judgment of the jury" (U.S. v. Petrillo, 821 F.2d 85, 2nd Cir., 1987).

The Fogliano testimony against Simon was in essence that he had been extorted by Simon to the extent of $9,000 worth of tile floor. Simon took the stand and denied it.

Added to the fact that the Fogliano claim had nothing to do with the Wedtech RICO charges was the emphasis placed upon Fogliano by the prosecutor in his opening that Fogliano was a "small-business man" who was forced to pay off Simon.

The evidence before Judge Motley was irresistible that the government knew that

the tax evasion was enormous, possibly the exact $8.5 million. But the description of Fogliano as a "small business-man" would hardly be accepted by a jury if Fogliano testified to the true extent of his tax evasion.

Accordingly, Fogliano was permitted to state under oath that he had failed to report only $600,000 to $800,000 in income over several years.

The New York State prosecutors, who jointly investigated the Wedtech matter, discovered the Fogliano tax evasion at least six months before he testified. They communicated the facts to the federal prosecutors who brought the knowledge of Fogliano's tax evasion to the attention of Simon's lawyers four months before the testimony. Simon was not advised, however, of the magnitude of Fogliano's crime.

It is not at all likely that the extent of the tax evasion was unknown to the Federal prosecutors when they advised Simon of the fact, but not the amount, of Fogliano's tax defalcation. The New York State prosecutor, in charge of the Fogliano case, described the tax evasion as:

> "perhaps one of the largest multi-million dollar income tax evasions by a single individual in New York State history..."

That Simon was interested in the extent of the tax evasion was made clear to the government when he obtained Fogliano's tax returns days before the latter took the witness stand. It was also abundantly clear that the prosecutor, who was in charge of Fogliano's preparation for testimony, spent many hours with him before he took the stand.

Simon moved for a new trial and for a hearing to determine the extent of the government's knowledge when it stood silently by as Fogliano lied. The reason for the

hearing is the two separate standards of proof which the majority indicated in U.S. v. Agurs, 427 U.S. 97, 49 L.Ed2d 342, 96 S.Ct 2392, as necessary in an application for a new trial.

When newly discovered evidence is not available to the prosecutor a different standard applies than the standard used when it is available and actively requested by the defendant.

In the latter case, the Court held in Agurs (427 U.S. at p. 111, 49 L.Ed.2d at p. 354):

> "...the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal."

In the context of the record, the possibility of a reasonable doubt is all the Court required.

The myth of Fogliano's being a small businessman put upon by a public official to

the extent of a $9,000 tile floor would have exploded before the jury had it known that he was the largest multi-million dollar tax evader in the history of the State of New York to the tune of $8.5 million, 10 times the amount to which he testified.

It boggles the imagination that such a man would submit to the extortion of a $9,000 tile floor.

Nor is it likely that the state prosecutor, who informed the government of the Fogliano tax evasion, kept to himself the belief that the State had bagged "the largest multi-million dollar income tax" evader in its history.

A hearing to assess responsibility for the perjury and a new trial should have been granted.

## IV

## A NEW TRIAL IS NECESSARY BECAUSE THE PROOF AT TRIAL RELATING TO STANLEY SIMON'S EXTORTION OF WEDTECH AMOUNTED TO AN UNCONSTITUTIONAL CONSTRUCTIVE AMENDMENT OF THE INDICTMENT

The government argued to the jury that it could convict Simon based on a theory which unconstitutionally broadened the terms of the indictment's charges. Because that is per se violative of the grand jury clause of the Fifth Amendment, a new trial is warranted.

The most glaring instance of unconstitutional broadening related to the central charge in this case: that on June 20, 1984, Stanley Simon obtained a promise from Fred Neuberger at Yonkers Raceway for $50,000 from Wedtech in exchange for a July vote in Wedtech's favor. The June 20 date was consistent with what was pleaded in the indictment: that "mid-1984" Stanley Simon received a commitment from representatives of

Wedtech to pay $50,000.00 in cash, contributions and payment for expenses. This "mid-1984" language was embodied in the indictment's substantive RICO charge (Count 1) as racketeering Act No. 4, as well as a separate substantive charge (Count 19). Four cooperating government witnesses (Neuberger, Moreno, Guariglia and Shorten) all testified about this June raceway meeting. The government called an employee from Yonkers Raceway for the express and sole purpose of offering into evidence a document purporting to show Stanley Simon present at a June 20 meeting. And the District Court, in denying Simon's motions to dismiss based on insufficient evidence, specifically found this June meeting to be an integral part of the government's case.

But the government reversed fields and argued differently once Simon proved on his own case that the June meeting never

happened. The proof offered by Simon -- through disinterested witnesses, documents and photographs -- established beyond any question that Stanley Simon met Fred Neuberger at Yonkers Raceway only once: on November 14, 1984. The government was thus compelled to concede the point during closing summation. It's lawyer argued that Neuberger "probably" met Simon at the raceway in November.

The grand jury, however, was not presented with evidence of a November meeting. That is why the indictment charged Simon with demanding and receiving $50,000.00 from Wedtech in "mid-1984" not late-1984. By any reckoning, the middle of November -- six weeks before the end of the year -- is not mid-1984. Thus, for the government to tell the jury that it could convict Simon based on a critical event occurring in late-1984, after the Board of Estimate vote had taken

place, amounted to a constructive broadening of the indictment.

In Stirone v. United States, 361 U.S. 212, 4 L.Ed. 252, 80 S.Ct. 270, (1960) this Court stated:

> "Where an essential element of the charge has been altered without resubmission to the grand jury, '[d]eprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.'"

In the case, the proof at the trial broadened the possible basis for conviction beyond what was contained in the indictment and constituted an unconstitutional amendment (as opposed to a variance in the proof) of the indictment. See United States v. Miller, 471 U.S. 130, 85 L.Ed.2d 99, 107 S.Ct. 1811 (1985).

Here, too, there has been a broadening of the indictment. By arguing to the jury that they could convict Mr. Simon based upon a meeting that "probably" happened in

November - after the critical Board of Estimate vote-the government permitted the trial jury to convict based upon proof not presented to the grand jury.

The grand jury was only told of a June meeting at Yonkers Raceway prior to the critical Board of Estimate vote and hence the "mid-1984" language in the indictment. Since the grand jury did not know that the meeting at Yonkers Raceway actually took place in November, 1984 it did not consider that at the time of the alleged extortion Simon's function with regard to the One Loop Drive lease was functus officio.

Broadening the charges beyond the "mid-1984" date was thus unconstitutional and a violation of Simon's Fifth Amendment Right.

V

## PETITIONER ADOPTS ARGUMENTS OF THE CO-APPELLANTS INSOFAR AS THEY APPLY TO HIM

In addition to all of the foregoing petitioner Stanley Simon adopts for himself all arguments submitted in support of petitions for Writs of Certiorari by the co-appellants in the proceeding below, insofar as they apply to him and are not inconsistent herewith.

## CONCLUSION

## THE PETITION FOR CERTIORARI SHOULD BE GRANTED

Respectfully Submitted

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APPENDIX A

UNITED STATES of America, Appellee,

v.

Mario BIAGGI, Stanley Simon, Richard Biaggi, Peter Neglia, John Mariotta, and Bernard Ehrlich, Defendants-Appellants.

Nos. 35, 24, 25, 26, 27, 23, Dockets 88-1530, -1531, -1532, -1533, -1543, 89-1015.

United States Court of Appeals, Second Circuit.

Argued Aug. 28, 1989.

Decided June 29, 1990.

Former United States congressman, his son, his former law partner, former borough president, defense contractor's former chief executive officer, and former regional administrator of Small Business Administration were convicted in the United States District Court for the Southern District of New York, Constance Baker Motley, J., of various offenses arising out of the affairs of defense contractor. The District Court, Motley, J., 705 F.Supp. 864, denied posttrial motions. Defendants appealed. The Court of Appeals, Jon O. Newman, Circuit Judge, held that: (1) jury plan using voter registration list as exclusive source of names of prospective jurors did not violate Fifth or Sixth Amendments; (2)

evidence was insufficient to show that congressman's son knew that shares of stock in defense contractor were issued in return for congressman being influenced to assist defense contractor as congressman; (3) evidence was sufficient to sustain bribery conviction against congressman and others; (4) bribe and false denial of same bribe did not satisfy pattern of racketeering activity element of offense under Racketeer Influenced and Corrupt Organizations Act; and (5) defense contractor's former chief executive officer was denied fair trial when district court excluded evidence of immunity negotiations.

Affirmed in part, reversed in part, vacated in part, and remanded.

1. Indictment and Information ⇐129(4)

Joinder of extortion counts against defendant was permissible, even if standards for severance of counts in multidefendant trial were applicable, and even though victims of extortions were different, where extortions were within "same series of acts or transactions"; defendant used one victim as means of obtaining many benefits derived from another victim. Fed.Rules Cr.Proc.Rule 8(a, b), 18 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

**2. Indictment and Information ⇐129(1)**

Defendant's tax evasion count was properly joined with extortion counts, where core of tax count was extorted income, even though tax count included a relatively small amount of income from unrelated transaction. Fed.Rules Cr.Proc. Rule 8(a, b), 18 U.S.C.A.

**3. Criminal Law ⇐622**

Defendant charged with bribery, gratuity, mail fraud, and filing false tax return counts was not prejudiced by his joinder with other defendants charged with core of illegalities regarding payments from defense contractor, even though many alleged illegalities concerned activities of law firm, and defendant had to show his membership in law firm to justify his receipt of stock interest in defense contractor, where even in separate trial much of the evidence concerning activities of law firm and defense contractor would have been admissible to prove circumstances concerning the stock transaction. 18 U.S.C.A. §§ 201(b, c), 1341; 26 U.S.C.A. § 7206(1).

**4. Constitutional Law ⇐267**
**Jury ⇐33(1.3)**

Jury plan using voter registration lists as exclusive source of names of prospective jurors did not violate due process, even though use of voter registration lists resulted in underrepresentation of blacks and

Hispanics, where there was no showing that blacks or Hispanics had been hindered in registering to vote. U.S.C.A. Const. Amend. 5.

5. Jury ⇐33(1.1)

Discriminatory intent is not element of claim that jury selection plan violates "fair cross-section" requirement of Sixth Amendment. U.S.C.A. Const.Amend. 6.

6. Jury ⇐33(1.1)

Sixth Amendment assures only opportunity for representative jury, rather than a representative jury itself.

7. Jury ⇐33(1.3)

Jury selection plan based on voter registration lists did not violate Sixth Amendment's "fair cross-section" requirement, even though plan resulted in underrepresentation of blacks and Hispanics. U.S. C.A. Const.Amend. 6.

8. Jury ⇐33(1.3)

Jury selection plan based on voter registration lists did not violate Jury Selection and Service Act, although plan resulted in underrepresentation of blacks and Hispanics. 28 U.S.C.A. §§ 1861–1869.

9. Jury ⇐33(5.1)

Prosecution's explanations for its challenges to four of six potential Hispanic jurors and five of six potential Italian-American jurors were neutral and not pretextual, and satisfactorily rebutted claim of discrimination.

10. Jury ⇐117

*Batson* objections should be entertained and adjudicated during process of jury selection.

11. Jury ⇐117, 118

District court's preference for written motions in complex trial must give way to the need to resolve *Batson* claim at point where prompt corrective action can be taken if claim is successful.

12. Jury ⇐142

District court's postponement of *Batson* inquiry until defendants filed written motion was not ground for complaint by defendants on appeal, where defendants had not objected to requirement of written motion and did not present motion until end of trial.

13. Jury ⇐33(5.1)

Government could not bolster its denial of discrimination in jury selection by showing how closely the ethnic composition of jury resembled that of venire from which it was selected.

14. Jury ⇐33(5.1)

Composition of jury may be relevant to rebutting claim of discrimination by prosecution in jury selection, but pertinent comparison is between jury as selected and racial or ethnic composition of population of judicial district, not composition of venire drawn for particular case; latter might

contain underrepresentation of cognizable group compared to pertinent population.

15. Bribery ⇐11

Evidence was sufficient to show in trial of United States congressman's son for aiding and abetting congressman's commission of bribery and gratuity offenses, based upon defense contractor's grant of stock interest to son, that son was holding stock as nominee for congressman. 18 U.S.C.A. § 201(b, c).

16. Bribery ⇐11

Evidence was insufficient to show, in trial of United States congressman's son for aiding and abetting congressman's commission of bribery and gratuity offenses, that son knew that shares granted to him by defense contractor were issued for congressman's benefit in return for congressman being influenced to assist defense contractor; what little evidence existed as to son's knowledge would only have supported finding that he knew that stock was put in his name to circumvent limits on congressman's outside income. 18 U.S.C.A. § 201(b, c).

17. Internal Revenue ⇐5263.35

United States congressman's son was properly convicted of filing false tax return by overstating his income to include receipt of shares of stock in defense contractor, and subsequent profit from their sale,

where evidence showed defendant's knowledge that he only held shares as nominee for his father. 26 U.S.C.A. § 7206(1).

18. Internal Revenue ⇐5263.35

To convict defendant of filing false tax return by overstating his income to include receipt of shares of stock owned by another and subsequent profit from their sale, defendant only had to have knowledge of true ownership of stock, not of unlawful purpose for which stock shares were issued. 26 U.S.C.A. § 7206(1).

19. Criminal Law ⇐1190

Upon reversal of defendant's conviction for aiding and abetting bribery and gratuity, but affirmance of convictions for mail fraud and filing false tax return, defendant was entitled to resentencing, even though defendant had received concurrent sentences for convictions, where district judge may have regarded tax return offenses as aggravated because of their relation to bribery offenses. 18 U.S.C.A. §§ 201(b, c), 1341; 26 U.S.C.A. § 7206(1).

20. Criminal Law ⇐1190

Reversal of conviction on serious charges should afford opportunity for consideration of reduction of sentences on remaining counts, unless sentencing judge's intent to scale sentences according to seriousness of the several offenses is clear.

21. Extortion and Threats ⇐1
Bribery ⇐1(1)

Payment to law firm does not necessarily become unlawful under gratuity, bribery, and extortion statutes because firm used its political contacts to assist its client in matter that requires governmental approvals, in addition to rendering traditional legal services such as negotiating and drafting lease. 18 U.S.C.A. §§ 201(b)(2)(A), (c)(1)(B), 1951(b)(2).

22. Bribery ⇐1(1)
Extortion and Threats ⇐4

Evidence was sufficient to convict defendants of bribery and extortion, even though payment in part had lawful purpose of compensation for legal services rendered by law firm, where payment was also demanded by United States congressman and directed to his son's law firm to obtain congressman's assistance as public official in securing favorable action from other public officials. 18 U.S.C.A. §§ 201(b)(2)(A), 1951(b)(2).

23. Bribery ⇐1(1)

Payment may be found to constitute bribe and extortion where it is sought and paid for both lawful and unlawful purposes. 18 U.S.C.A. §§ 201(b)(2)(A), 1951(b)(2).

24. Criminal Law ⇐22

Valid purpose that partially motivates a transaction does not insulate participants

in unlawful transaction from criminal liability.

25. Extortion and Threats ⇐4

If United States congressman demands payment for taking official action as to matter that requires some legal services, his demand is extortion if he instructs payer to retain his son's law firm for needed services and to pay sum for both firm's legal services and his own official action; in such cases, however, evidence must suffice to permit jury to find beyond reasonable doubt that unlawful purposes were of substance, not merely vague possibilities that might attend otherwise legitimate transaction. 18 U.S.C.A. § 1951.

26. Bribery ⇐1(1)

Client paying his law firm's legal fee does not commit bribery simply because United States congressman is "of counsel" to firm and client hopes that congressman will someday be helpful. 18 U.S.C.A. § 201(b).

27. Bribery ⇐11

Extortion and Threats ⇐15

Evidence was sufficient to show in trial of United States congressman for bribery and extortion that defense contractor's payment of $50,000 to law firm in which congressman was "of counsel" and in which his son was attorney was demanded and paid, at least in part, to obtain congressman's political services; payment fol-

lowed prior extortionate demand by congressman and partner in that law firm, payment was discussed with congressman while matters were pending on which congressman's assistance was urgently needed, law firm's bill to defense contractor was submitted just one week after need for congressman's assistance became apparent, bill was paid the day after governmental action favorable to defense contractor, and bill was not accompanied by normal law firm time records. 18 U.S.C.A. §§ 201(b), 1951.

28. United States ⇐52

Involvement by regional administrator of Small Business Administration in affairs of defense contractor after being promised position at law firm for which defense contractor would partially pay salary violated conflict-of-interest statute, which prohibits public official from participating in matter in which prospective employer has financial interest. 18 U.S.C.A. § 208.

29. Bribery ⇐11

Evidence was sufficient to show in bribery trial of former regional administrator of Small Business Administration that administrator accepted job promise at law firm, in return for being influenced in his duties regarding defense contractor; defense contractor had agreed to pay one half of administrator's salary at law firm, and

administrator had previously rendered unlawful assistance to defense contractor. 18 U.S.C.A. § 201(b).

30. Commerce ⇐9

Gratuity offense could not be used as predicate act to establish pattern of racketeering activity necessary for conviction under Racketeer Influenced and Corrupt Organizations Act; gratuity was lesser included offense of bribery, which was also charged as predicate act. 18 U.S.C.A. §§ 201(b, c), 1962(c).

31. Commerce ⇐10

Violation of statute prohibiting the making of false statements is not eligible for use as predicate act of racketeering activity under Racketeer Influenced and Corrupt Organization Act, as such violations are not within the offenses that define "racketeering activity." 18 U.S.C.A. §§ 1001, 1961(1).

32. Commerce ⇐7

Fact that obstruction of justice offense is eligible for use to establish pattern of racketeering activity under Racketeer Influenced and Corrupt Organizations Act does not necessarily mean that it suffices in every case. 18 U.S.C.A. §§ 1503, 1961(1).

33. Commerce ⇐9, 10

Bribe and false denial of that same bribe will not satisfy pattern of racketeer-

ing activity requirement for violation of Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C.A. § 1962(c).

34. Commerce ⇐6

Defendant who both made bribe and made false denial of same bribe could not be convicted of engaging in pattern of racketeering activity in violation of Racketeer Influenced and Corrupt Organizations Act, in absence of its additional predicate acts of racketeering activity. 18 U.S.C.A. § 1962(c).

35. Criminal Law ⇐1190

Reconsideration of defendant's sentences imposed for bribery and obstruction offenses was warranted, where defendant's conviction under Racketeer Influenced and Corrupt Organizations Act was reversed, even though defendant had received concurrent terms on bribery and racketeering counts. 18 U.S.C.A. § 201(b), 1961 et seq.

36. Obstructing Justice ⇐7

Even if "exculpatory no" doctrine is applicable to obstruction of justice charge, doctrine was inapplicable where defendant's statements to Department of Defense investigator went beyond bare denials of wrongdoing, but instead defendant manufactured false version of events. 18 U.S.C.A. § 1503.

37. Post Office ⇐35(9)

Schemes by defense contractor's former chief executive officer, under which he

misrepresented his majority interest in corporation before public offering of stock, and made similar misrepresentation with respect to sham stock purchase agreement, deprived victim of money or property, and thus were actionable mail frauds, where schemes deprived Department of Defense of its property right to control award of contracts to socially and economically disadvantaged individuals, even though Department used services of Small Business Administration to administer disadvantaged business program. 18 U.S.C.A. § 1341; Small Business Act § 2[8](a), as amended, 15 U.S.C.A. § 637(a).

38. Criminal Law ⇐1137(7)

Defendant's claim that testimony in trial for extortion and related predicate acts under Racketeer Influenced and Corrupt Organizations Act about June meeting was conclusively refuted by records and photographs had not been preserved at trial; defense counsel had told judge that if Government was going to argue that meeting occurred in June, that was issue of fact for jury, and defendant's motion for directed verdict should be denied. 18 U.S.C.A. §§ 1951, 1961 et seq.

39. Extortion and Threats ⇐15
Racketeer Influenced and Corrupt Organizations ⇐121

Evidence was sufficient to convict former New York borough president of extor-

tion and related predicate acts under Racketeer Influenced and Corrupt Organizations Act in connection with $50,000 payment solicited from defense contractor for charity; borough president had assisted defense contractor in completing lease transaction with city. 18 U.S.C.A. §§ 1951, 1961 et seq.

40. Indictment and Information ⇐159(3)

Government did not constructively amend indictment charging defendant with extortion and related predicate acts under Racketeer Influenced and Corrupt Organizations Act in violation of Fifth Amendment by shifting its focus from June meeting to November meeting; evidence of November demand for payment of money did not constitute modification of essential element of offense. 18 U.S.C.A. §§ 1951, 1961 et seq.; U.S.C.A. Const.Amend. 5.

41. Criminal Law ⇐42

Government established source independent of defendant's immunized grand jury testimony for receiving invoice used to cross-examine defendant's wife concerning her knowledge of her husband's business dealings, where document was obtained pursuant to subpoena issued before defendant's state grand jury testimony.

42. Criminal Law ⇐42

Witnesses' testimony that their decision to cooperate with Government was

influenced not only by prospect of extensive federal prison terms but also by prospect of state prison terms resulting from state grand jury investigation in which defendant gave immunized testimony did not preclude district court from finding that Government's evidence from cooperating witnesses was independent of immunized testimony and that *Kastigar* hearing was not necessary, especially where defendants alleged the witnesses cooperated because they had heard generally about state investigation, rather than by anything that defendants had stated to state grand jury.

**43. Criminal Law ⇐351(1)**

Evidence that defendant has rejected offer of immunity in exchange for testifying as to wrongdoing is relevant and admissible to show defendant's "consciousness of innocence." Fed.Rules Evid.Rule 401, 28 U.S.C.A.

**44. Criminal Law ⇐351(1)**

Defendant was denied fair trial due to district court's exclusion of evidence of immunity negotiations with defendant, during which Government had allegedly offered defendant immunity if he would testify regarding wrongdoing by others, and defendant denied knowledge of any such wrongdoing. Fed.Rules Evid.Rule 401, 28 U.S.C.A.

45. Criminal Law ⇐351(1), 1170(1)

District court's exclusion of evidence that defendant had allegedly rejected immunity offer in exchange for testifying as to wrongdoing required reversal of bribery convictions, where evidence that defendant had denied knowledge of unlawful activities of others may have affected jury verdict. 18 U.S.C.A. § 201(b); Fed.Rules Evid.Rule 401, 28 U.S.C.A.

46. Racketeer Influenced and Corrupt Organizations ⇐26

In some circumstances, jury's finding of two predicate acts, lawfully constituting pattern of racketeering activity under Racketeer Influenced and Corrupt Organizations Act, and of other elements of offense under Act, will permit affirmance of conviction under Act notwithstanding invalidation of other predicate acts. 18 U.S.C.A. § 1961 et seq.

47. Racketeer Influenced and Corrupt Organizations ⇐26

Reversal of conviction under Racketeer Influenced and Corrupt Organizations Act was required upon reversal of predicate acts of bribery due to district court's improper exclusion of "state of mind" evidence, even though predicate acts of mail fraud were affirmed, where excluded evidence might have sufficed to persuade jury to find that the two mail fraud offenses did not constitute pattern of racketeering activity. 18 U.S.C.A. § 1961 et seq.

48. Criminal Law ⇐1190

Reversal of convictions for bribery and violation of Racketeer Influenced and Corrupt Organizations Act did not require reconsideration of defendant's sentences on mail fraud and tax evasion convictions, where vacated counts carried sentences far more severe than sentences on remaining counts. 18 U.S.C.A. §§ 201(b), 1341, 1961 et seq; 26 U.S.C.A. § 7201.

49. Criminal Law ⇐1137(6)

Defendant could not contend on appeal that district court erroneously excluded evidence of his state of mind where defendant elected, for understandable tactical reasons, not to press for admission of evidence to show state of mind after Government asserted that admission of state of mind evidence would permit Government to introduce act evidence in rebuttal.

50. Criminal Law ⇐419(2.20)

Evidence as to what defendant's father, who was United States congressman, stated regarding his ownership of stock transferred to defendant by defense contractor, bore only tangential relevance to defendant's state of mind in bribery trial, and thus limitations on admission of such evidence was not error; defendant's wife was permitted to testify to conversations that bore on defendant's state of mind concerning ownership of stock.

51. Criminal Law ⇐627.6(2), 661

In trial of former United States congressman for bribery and extortion relating to defense contractor, district court acted within its discretion in rejecting requests for documents and testimony showing involvement of Attorney General and other officials in obtaining government contracts for contractor, despite congressman's defense that contractor did not need to bribe democratic congressman because contractor already had aid of republican executive branch officials; such documents and testimony would have greatly expanded scope of already wide-ranging trial, defense had been able to establish considerable role played by Attorney General in assisting defense contractor, and prosecution made no attempt to dispute allegations of Attorney General's involvement on behalf of defense contractor or unlawfulness of that involvement.

52. Extortion and Threats ⇐15

Inference of inducement arising in extortion trial from repeated acceptance of substantial benefits does not apply to elected official who may lawfully receive campaign contributions; permitting such inference would subject every recipient of campaign contributions to conviction for extortion. 18 U.S.C.A. § 1951.

53. Extortion and Threats ⇐16

When elected official who has received campaign contributions is charged with ex-

tortion and with receiving bribes, charge must carefully focus jury's attention on difference between lawful political contributions and unlawful extortionate payments and bribes. 18 U.S.C.A. §§ 201(b), 1951.

54. Extortion and Threats ⇐16

To tell jury in extortion trial of elected public official that whether payment is lawful campaign contribution or unlawful extortion or bribe is matter to be resolved based on all evidence in case is insufficient. 18 U.S.C.A. § 1951.

55. Extortion and Threats ⇐15

In trial of public official for extortion, factors that might bear on issue of whether payment is lawful campaign contribution or unlawful extortion or bribe may include whether contribution was reported, whether it was unusually large compared to contributor's normal donations, whether official threatened adverse action if contribution was not made, and how directly the official or those soliciting for him linked contribution to specific action to be taken by official. 18 U.S.C.A. §§ 201(b), 1951.

56. Criminal Law ⇐1172.2

Jury instruction in extortion trial of New York borough president, which permitted inference of inducement from repeated exceptance of substantial benefits, did not warrant reversal of conviction, even

if charge was inappropriate; borough president did not defend on ground that money received was lawful campaign contribution, but on ground that demand was never made and that money was never received or paid on his behalf. 18 U.S.C.A. § 1951.

57. Criminal Law ⇐1043(2)

Generally, the proffer of requested instruction does not excuse defendant from need to object specifically to its omission from charge in order to preserve issue for appeal.

58. Criminal Law ⇐1043(2)

General complaint of failure to give requested instructions might suffice to preserve claim concerning a request fully considered and denied by trial court at charge conference and wholly omitted from charge, but where topic is covered in charge, complaint that charge language incorrectly or inadequately covers the topic must be specifically called to court's attention after charge is given. Fed.Rules Cr. Proc.Rule 30, 18 U.S.C.A.

59. Criminal Law ⇐1038.2

District court's failure to give charge requested by defense in tax evasion trial, that furnishing of labor and materials to taxpayer would not constitute taxable income if taxpayer intended to pay for work done and materials supplied upon completion of work, was not plain error, where there was no reasonable possibility that

verdict on tax count would have been different; district court had made general charge on topic of reportable income. 26 U.S.C.A. § 7201.

60. Bribery ⇐14

Extortion and Threats ⇐16

District court's characterization of defense contention in extortion and bribery trial that stock received was issued in payment for past legal services did not obscure the defense, although defendant contended that stock was compensation for loyalty in general; district court's formulation did not affect substantial rights of defendant, and "loyalty" rationale was not so distinct from motivation of paying for past services that it had to be separately mentioned. 18 U.S.C.A. §§ 201(b), 1951.

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Before FEINBERG and NEWMAN, Circuit Judges, and MISHLER, Senior District Judge.*

JON O. NEWMAN, Circuit Judge:

This is an appeal by six defendants, including a former United States Congressman, from convictions arising out of the affairs of the Wedtech Corporation, a manufacturing company located in New York City that received contracts from the Defense Department. The defendants are former Congressman Mario Biaggi; his son, Richard Biaggi; the Congressman's former law partner, Bernard Ehrlich; the former Bronx Borough President, Stanley

* The Honorable Jacob Mishler of the District Court for the Eastern District of New York, sitting by designation.

Simon; the former chief executive officer of Wedtech, John Mariotta; and the former New York regional administrator of the Small Business Administration, Peter Neglia. The six defendants appeal from judgments of conviction entered November 18, 1988,[1] in the Southern District of New York (Constance Baker Motley, Judge) after a five-month jury trial.

The appeal presents a host of issues. It also requires some consideration of the distinction between bribes and extortion payments, on the one hand, and political contributions and legal fees, on the other hand. The distinction is clear in theory, but this case demonstrates how blurred the line can become in practice when a company that requires political assistance and legal services in dealing with governmental bureaucracies makes payments to office holders and lawyers associated with them. Though the distinction is implicated in this case, we are satisfied that the risk of mischaracterizing lawful political contributions and legal fees as bribes and extortion payments did not reach the point where rights of the defendants were denied. Other considerations, however, lead us to reverse convictions of some defendants on some counts. We affirm the convictions of all defendants on at least two counts.

1. Ehrlich's judgment was entered January 10, 1989.

## BACKGROUND

To promote understanding of the many issues in this complex case we set forth first the undisputed facts of Wedtech's history and then the Government and the defense contentions concerning the different activities that form the basis for the criminal charges.

*Undisputed Facts.* Wedtech began its existence as Welbilt Electronic Tool & Die Corporation ("Welbilt"), a small sheet metal fabricating company located in the South Bronx. Welbilt changed its name to Wedtech in 1983 when it made a public offering of its stock. For convenience, we will refer to the company at all times as "Wedtech." Defendant John Mariotta founded the company and remained chairman until company officials ousted him in 1986. In 1975 Wedtech was accepted into the Small Business Administration's "Section 8(a)" program, under which minority-owned businesses are eligible for government contracts without competitive bidding. *See* 15 U.S.C. § 637(a) (1988). Mariotta is of Puerto Rican descent.

In 1978 defendant Mario Biaggi, then a Congressman from the Bronx, met Mariotta and Fred Neuberger, a co-owner of Wedtech. In addition to serving in Congress, Biaggi was at that time a partner in a small law firm, known as Biaggi & Ehrlich. His law partner was defendant Bernard Ehrlich. Wedtech retained Biaggi & Ehr-

lich, initially at an annual retainer of $20,000. The retainer was subsequently increased in stages to $150,000. Biaggi withdrew as a member of the law firm in 1979, after the House of Representatives adopted Rule XLVII, which limited outside income of members of the House to 30 percent of their salaries.[2] The law firm bought his partnership interest for $320,000 to be paid over a ten-year period. Biaggi remained in an "of counsel" relationship to the firm. Biaggi's son, defendant Richard Biaggi, became a partner in the firm in 1983.

Starting in 1978, Biaggi (all references are to the father, unless otherwise indicated) contacted various governmental officials on behalf of Wedtech, urging awards of contracts from the Defense Department through the SBA's section 8(a) program and loans from the Economic Development Administration. In addition to Biaggi, Wedtech also benefitted from the services of attorney E. Robert Wallach, former White House assistant Lyn Nofziger, and other Washington lobbyists. Wallach frequently contacted then White House Chief of Staff Edwin Meese on Wedtech's behalf.

Among the benefits achieved for Wedtech by its lobbyists and lawyers were the awards of a $27 million contract in 1982 to

2. Rule XLVII was adopted after enactment of the Ethics in Government Act of 1978, Pub.L. 95-521, 92 Stat. 1824 (1978), *codified at* 5 U.S.C. app. § 210 (1988), which limited outside income of Executive Branch officials.

make small engines for the Army and a $24 million contract in 1984 to make pontoons (raft-like structures carried on ships to aid in unloading) for the Navy. Despite these contract awards, Wedtech experienced serious financial difficulties and ultimately filed for bankruptcy at the end of 1986.

*Contentions Concerning Criminality.* The Government's evidence against the defendants came primarily from four Wedtech officials, Fred Neuberger, Mario Moreno, Lawrence Shorten, and Anthony Guariglia. These four cooperating witnesses had been charged with a series of federal and state violations arising out of their activities at Wedtech and had pled guilty pursuant to plea agreements. All four testified under grants of use immunity. Their testimony concerned six basic matters:

1. *The Five Percent Stock Interest.* When Wedtech went public, the company issued two and one-half percent of its stock to Ehrlich and an equal percent to Richard Biaggi. The Government contended that Richard was given his share as a nominee for his father, that the total five percent stock interest was paid as a bribe to influence Congressman Biaggi to use the powers of his office to secure government contracts for Wedtech, and that the payment was made in response to an extortionate demand by the Congressman, aided by Ehrlich. A restriction precluded sale of the shares for two years, a circumstance that

made it difficult to ascertain their value when issued. The law firm's accountant placed the value, when issued, at $35,000 for each recipient. After the restriction was lifted, Ehrlich and Richard Biaggi sold about one-third of their shares, each realizing more than $600,000.

The defendants contended that the five percent stock interest was transferred to the partners of the law firm, Ehrlich and Richard Biaggi, in fulfillment of a previous promise to reward the firm for its loyalty to Wedtech in the early days when the firm billed modestly for legal services, declined to insist on prompt payment, and did not bill at all for some services. Defendants also contended that Richard Biaggi was issued the stock for himself as a partner in the law firm, and not as a nominee for his father.

2. *The $50,000 Loop Drive Payment.* After Wedtech obtained the pontoon contract from the Navy, it needed a waterside property at which to test the vessels and identified a site known as One Loop Drive, located in the Bronx. The property was owned by New York City. To secure the City's willingness to lease the property, Ehrlich sought the assistance of defendant Stanley Simon, who was then the Bronx Borough President and a member of the Board of Estimate, which approved City leases. Simon arranged for Wedtech officials to meet with Susan Frank, the City's Commissioner of Ports and Terminals.

Over the course of a few days in June 1984, a three-year lease was negotiated whereby the City agreed to rent the Loop Drive property to Wedtech for $50,000 a year, well below the annual rent of $125,000 the City had initially requested. Ehrlich negotiated the lease terms on behalf of Wedtech. Ehrlich and his firm also negotiated with a corporation that occupied the building at One Loop Drive to assure Wedtech's use of the site's parking lot in connection with waterside activities required to fulfill the pontoon contract.

The lease required approval of the Board of Estimate. Wedtech needed prompt approval in order to satisfy the Navy that it had the waterside site needed to perform the contract. To secure approval at the Board's June 13 meeting required unanimous consent, since the matter had arisen too quickly to be placed on the agenda for that meeting. Two Board members objected, and, consequently, the item was deferred until July. Biaggi called Simon and demanded his assistance in having the lease approved at a subsequent meeting. According to Moreno, Ehrlich reported that Biaggi had "punished" Simon, warning him "that his next election depended on Mario Biaggi's support and that he had to start moving really quick." The Board approved the lease at its July 12 meeting.

Ehrlich informed Moreno that the law firm would bill Wedtech $50,000 for work

performed in connection with the Loop Drive property. At that time the firm's annual retainer was $150,000. Ehrlich said that the transaction required considerable extra work. He referred both to strictly lawyering activities and to political efforts the firm undertook to secure Board of Estimate approval. The firm billed Wedtech $50,000 for "Ports and terminal matter. Services rendered June 1984," and the bill was paid on July 13. Thereafter, Moreno paid a young associate at the firm, Carlos Cuevas, Jr., $5,000 as a bonus for his work on the Loop Drive transaction.

The Government contended that the $50,000 payment to the law firm was a bribe to Biaggi to induce him to use his official position to secure City and Board of Estimate approvals for the Loop Drive lease and that the payment was made in response to extortionate demands by Biaggi, aided and abetted by Ehrlich.

The defendants contended that the $50,000 was a fee for legal services rendered in connection with leasing the Loop Drive property.

3. *Benefits to Simon.* The Government contended that Stanley Simon also made an extortionate demand upon Wedtech for $50,000, which the Government alleged was in connection with the Loop Drive lease. Neuberger testified that in June 1984 he attended a benefit for the Riverdale (New York) Hebrew Home for

the Aged held at the Yonkers racetrack. At that function, according to Neuberger, Simon said to him that "he [Simon] is running a re-election campaign that is a very hard fought campaign and he needs help." When Neuberger asked, "[W]hat kind of help do you expect?", Simon replied $75,000 or $100,000. Neuberger thought these figures were ridiculous and observed that it was illegal for a corporation "to make a contribution to a campaign." Simon then said, "[W]ell, do it in the form of donations to synagogues, churches and some other expenses." Neuberger said the best he could do was $50,000 and "we settled for that."

Neuberger also testified that at the same function, he asked Susan Frank how things looked for the Loop Drive lease and was told that "you are in good shape." At that point, Neuberger testified, Simon pulled him aside and cautioned him not to talk with Frank.

Neuberger testified that the following Monday he gave instructions to a Wedtech employee, Ceil Lewis, to release a total of $50,000 for purposes that Simon would later indicate to her and to disburse the funds from a Wedtech account known as the FHJ account. The Government contended that the FHJ account was used to pay most of the $50,000 that Neuberger had promised Simon. According to the Government, the major expenditures were

$20,000 in charitable contributions to two synagogues, $10,000 as a political contribution to "Friends of Simon," and $10,000 in cash. Lewis testified that she gave the cash in a sealed envelope to Simon's assistant, Ralph Lawrence; he testified that he received an envelope from Lewis and gave it to Simon, unopened.

Simon acknowledged that Wedtech benefitted his reelection campaign but disputed the timing, purpose, and completion of the $50,000 of payments. He presented evidence from those handling arrangements for the Riverdale Hebrew Home to show (a) that the *June* 1984 fund-raising event at the Yonkers Raceway was arranged by the Men's Club of the Home and that the guest list, which included about 80 people, did not include the names of Stanley Simon or Fred Neuberger, and (b) that the Bronx Division of the Hebrew Home ran a fund-raising event at the Yonkers Raceway in *November* 1984 and that the guest list for this event showed Stanley Simon, Fred Neuberger, and Susan Frank in attendance.

Simon contended that the discussion concerning a political contribution occurred in January 1985 at his home on an occasion when he was receiving visitors mourning the death of his father. At that time, he testified, Neuberger volunteered that "people at the company" were going to contribute $50,000 to his 1985 reelection campaign for borough president. Simon testified

that Neuberger later contributed $10,000 and Mariotta $5,000. He denied receiving other political contributions from Wedtech officials and denied receiving a cash payment delivered by Lawrence or anyone else.

Thus, Simon's version was that the June 1984 race-track meeting between him and Neuberger never occurred, that such a meeting did occur at a similar fund-raising event in November 1984, months after the Board of Estimate had approved the Loop Drive lease, that the political contribution was not discussed until January 1985, that only $15,000 of contributions were received, and that any payments received were legitimate political contributions.

In addition to the $50,000 of payments allegedly made in response to an extortionate demand in connection with the Loop Drive lease, the Government contended that Simon received three other unlawful benefits, one of which was paid by Wedtech. Moreno testified that in 1981 Ehrlich introduced him to Simon, whom Ehrlich described as an important person to be "cultivated." Later Ehrlich told Moreno that Simon wanted Wedtech to hire Simon's brother-in-law, Henry Bittman. Wedtech complied, hiring Bittman as a payroll clerk at $20,000 a year and subsequently raising his salary to $35,000. Wedtech employees testified that Bittman's work was unsatisfactory but that he was kept on the payroll in fulfillment of a promise to Simon.

Simon did not dispute that Wedtech hired Bittman and gave him raises but denied that he had ever asked anyone at Wedtech to do so.

The two other alleged benefits were not paid by Wedtech. First, the Government contended that Simon hired Ralph Lawrence as his assistant when he was the Bronx Borough President and, when Lawrence's salary rose to $36,000, demanded that Lawrence kick back to him one half of all subsequent salary increases. Lawrence testified that, as his salary rose to $52,000, he shared half of his salary increases with Simon, providing the kickbacks in cash and purchases of goods and services for Simon's benefit, a significant portion of which was meals. The value of the kickbacks was approximately $14,000 over three and one-half years.

Simon acknowledged hiring Lawrence but denied demanding or receiving any portion of his salary. He also denied receiving cash from Lawrence. He acknowledged occasions when Lawrence paid a meal check for him, but maintained that the two ate together hundreds of times a year (as Lawrence had testified) and that sometimes Simon paid and sometimes Lawrence paid. Simon accused Lawrence of lying about the extortion arrangement, contending that Lawrence had made up the claim during a late-night questioning by the Bronx District Attorney's office. Lawrence conceded

that he was frightened during the questioning and made his accusations around 2 a.m.

The second non-Wedtech illegality charged to Simon concerned Sabino Fogliano, a Bronx contractor. The Government contended that Simon arranged introductions for Fogliano with various New York City officials and that in return Fogliano provided benefits to Simon. The only benefit alleged in the charges against Simon was $9,000 worth of marble and tile work done by Fogliano at Simon's home. Fogliano testified that he did the work at Simon's request and did not send a bill because he knew he would not be paid.

Simon acknowledged that Fogliano had supplied labor and materials worth $9,000 for work at his home, but he testified that the tile work was part of an overall home renovation job estimated to cost more than $22,000, that the job was never finished, and that he did not pay Fogliano both because he was not billed and because the work was not completed. Simon also contended that Fogliano did not send a bill once he learned that Simon was under federal investigation because Fogliano wanted to avoid any dealings that might direct federal investigators in his direction. Fogliano testified against Simon under a grant of use immunity from the federal government, and admitted on cross-examination that he had evaded federal income taxes on $800,000 of income. After trial, however,

Fogliano pled guilty to New York state charges of evading taxes on $8,500,000. Simon unsuccessfully sought a new trial on the ground that Fogliano had lied to minimize the extent of his tax evasions, thereby precluding an effective attack on his credibility and his motive for accusing Simon.

4. *The Section 8(a) Fraud.* The Government contended that Wedtech's application for admission to the section 8(a) program and its subsequent retention in the program by the SBA were fraudulent. A company qualifies for the section 8(a) program if it is at least 51 percent owned by "one or more socially and economically disadvantaged individuals," 15 U.S.C. § 637(a)(4)(A)(i)(I), a phrase that includes members of groups subjected to racial or ethnic prejudice, *id.* § 637(a)(5); *see* 13 C.F.R. § 124.105(b) (1990) (Hispanic Americans). Mariotta is of Puerto Rican descent. When Neuberger became Mariotta's partner, they created false documents to make it appear that Mariotta owned 66⅔ percent of Wedtech's stock, whereas each in fact owned 50 percent.

After Wedtech went public, the dilution of Mariotta's interest prompted Mariotta and other Wedtech officials to devise fraudulent arrangements to make it appear that Mariotta retained an ownership interest above 50 percent. The device was a series of "stock purchase agreements" whereby insiders who had received stock purported

to assign their interests to Mariotta, who was obligated to pay for the shares over a ten-year period, with no payments due for the first two years; upon Mariotta's failure to pay, the shares would revert to the insiders. Mariotta verbally agreed with the insiders that he would not make the payments, thereby assuring that the insiders would retain their interests.

The defendants contended that Mariotta owned two-thirds of Wedtech's stock when the first section 8(a) application was made and that the stock purchase agreements whereby he retained record ownership of a majority of Wedtech shares, after the public offering, were bona fide.

5. *The Slush Fund.* The Government contended that Mariotta and Neuberger established a bank account, known as "FHJ Associates," which they used to divert to themselves cash that belonged to Wedtech. The account was funded with money earned on goods manufactured by Wedtech but billed on FHJ invoices. Subsequently, other Wedtech officials, including Moreno, Shorten, and Guariglia, participated in the FHJ account. By the time he left Wedtech, Mariotta had received more than $1 million in cash from the FHJ account. The Government made no claim that any defendant other than Mariotta benefitted from the FHJ account.

Mariotta contended that funds he received from the FHJ account were repay-

ments of loans that he had made to Neuberger.

6. *The Neglia Bribe.* The Government contended that Wedtech officials obtained the cooperation of defendant Peter Neglia, the New York regional administrator of the SBA and later the chief of staff to the SBA Administrator in Washington, by bribing him with a promise of future employment. According to Moreno's testimony, Ehrlich and Moreno promised Neglia that after he left government employment he would have a job at the law firm of Biaggi & Ehrlich at a salary of $100,000 and that half of his salary would be paid by Wedtech.[3] The Government contended that this promise was made for Neglia's past help and in the expectation of his future assistance. Neglia had assisted Wedtech in remaining in the section 8(a) program after the public offering had diminished Mariotta's holding below the 50 percent mark, rendering Wedtech ineligible for continued participation. The Government contended that Neglia was aware of the sham nature of the Mariotta stock purchase agreements and of Wedtech's ineligibility

3. The Government also alleged, in separate counts and corresponding RICO predicate acts, that Neglia was bribed with $4,500 in contributions to Republican political organizations on behalf of Neglia and his designee, and a promise of an option to purchase 20,000 shares of Wedtech stock. The jury found these acts not proven.

for continued participation in the section 8(a) program. After the promise of future employment, Neglia alerted Wedtech to efforts brewing in the SBA and in Congress to decertify Wedtech and acted to keep Wedtech in the section 8(a) program.

Neglia denied acting improperly on Wedtech's behalf and denied being promised any employment with Biaggi & Ehrlich. He acknowledged that after he left the SBA in early 1986, he opened his own law office and did legal work for Biaggi & Ehrlich in an "of counsel" capacity to the firm. In 1986 the firm paid him $42,000.

These six episodes resulted in convictions of the appellants on the following charges:

1. The Five Percent Stock Interest:
extortion, 18 U.S.C. § 1951 (1988): Biaggi, Ehrlich
bribery, 18 U.S.C. § 201(b) (1988): Biaggi, Ehrlich, Mariotta, Richard Biaggi
gratuity, 18 U.S.C. § 201(c) (1988): Biaggi, Ehrlich, Mariotta, Richard Biaggi
mail fraud, 18 U.S.C. § 1341 (1988): Biaggi, Ehrlich, Richard Biaggi
false financial disclosure, 18 U.S.C. § 1001 (1988): Biaggi
false tax return, 26 U.S.C. § 7206(1) (1988): Biaggi, Richard Biaggi
2. The $50,000 Loop Drive Payment:
extortion: Biaggi, Ehrlich
bribery: Biaggi, Ehrlich, Mariotta
mail fraud: Biaggi, Ehrlich

3. Benefits to Simon:
$50,000 payment:
extortion: Simon
grand jury perjury, 18 U.S.C. § 1623 (1988): Simon
tax evasion, 26 U.S.C. § 7201 (1988): Simon
Job for Bittman:
extortion: Simon
grand jury perjury: Simon
Lawrence kickbacks:
extortion: Simon
tax evasion: Simon
grand jury perjury: Simon
Fogliano tile work:
tax evasion: Simon
grand jury perjury: Simon
4. The Section 8(a) Fraud:
mail fraud: Biaggi, Ehrlich, Mariotta
5. The Slush Fund:
tax evasion: Mariotta
6. The Neglia Bribe:
bribery: Ehrlich, Neglia
gratuity: Ehrlich, Neglia
obstructing justice, 18 U.S.C. § 1503 (1988): Neglia

Most of these substantive offenses were also charged as racketeering acts for purposes of RICO substantive and conspiracy offenses, 18 U.S.C. § 1962(c), (d) (1988). The jury found that Biaggi, Ehrlich, and Mariotta committed two or more RICO predicate acts and convicted these three

defendants of RICO substantive and conspiracy offenses. In addition, Biaggi was convicted of grand jury perjury for falsely denying that he contacted the Government on behalf of Wedtech.

The following aggregate sentences were imposed:

| | Prison Term | Fine |
|---|---|---|
| Biaggi | eight years | $242,000 |
| Ehrlich | six years | $222,000 |
| Simon | five years | $ 70,000 |
| Mariotta | eight years | $291,000 |
| Richard Biaggi | two years | $ 71,000 |
| Neglia | three years | $ 30,000 |

In addition, judgments of forfeiture were entered for the following amounts: Biaggi, $350,000; Ehrlich, $350,000; Simon, $25,000; Mariotta, $11,700,000.

## DISCUSSION

### I. Joinder

Misjoinder claims are advanced by several defendants. The major challenge is brought by Simon, who contends that he was entitled to a severance of two counts that charged criminal activity unrelated to Wedtech. Count 21 charged Simon with extorting from Ralph Lawrence, his assistant in the Bronx Borough President's office, one half of Lawrence's salary increases; Count 23 charged tax evasion for the year 1985, based on failure to report the $50,000 in benefits from Wedtech, the salary kickbacks from Lawrence, and the $9,000 of tilework from Sabino Fogliano.

Simon contends that since he was tried with other co-defendants, the governing standards are those of Rule 8(b) (joinder of defendants) of the Federal Rules of Criminal Procedure, rather than Rule 8(a) (joinder of offenses), and that joinder of Counts 21 and 23 is not permissible under Rule 8(b).

Judge Motley initially denied Simon's motion for severance, ruling that Rule 8(a) governed and that these counts were of "the same or similar character," Fed.R. Crim.P. 8(a), as other extortion counts in the indictment. *United States v. Biaggi*, 672 F.Supp. 112, 124 (S.D.N.Y.1987). Simon renewed his motion after this Court's decision in *United States v. Turoff*, 853 F.2d 1037, 1043 (2d Cir.1988), which appeared to state that claims for severance of counts in a multi-defendant case are to be governed by the standards of Rule 8(b). In a thoughtful opinion, drawing upon the equally thoughtful opinion of Judge Sand in *United States v. Clemente*, 494 F.Supp. 1310 (S.D.N.Y.1980), *aff'd on other grounds sub nom. Fiumara v. United States*, 727 F.2d 209 (2d Cir.), *cert. denied*, 466 U.S. 951, 104 S.Ct. 2154, 80 L.Ed.2d 540 (1984), Judge Motley ruled that *Turoff* should be understood to apply Rule 8(b) standards to the claim of a defendant in a multi-defendant trial only when he seeks severance of counts in which he and at least one of his co-defendants are charged,

and that Rule 8(a) standards apply to a defendant in a multi-defendant trial who seeks severance of counts in which he is the only defendant charged. *United States v. Biaggi*, 705 F.Supp. 852 (S.D.N.Y. 1988). However, Judge Motley also ruled that Counts 21 and 23 were properly joined even under the standards of Rule 8(b). *Id.* at 855–56, 862–64.

[1] Without resolving the issue of whether *Turoff* should be limited in the manner suggested by Judges Motley and Sand, we agree with the District Court that joinder of Counts 21 and 23 was proper even under Rule 8(b). Though the Lawrence extortion (Count 21) did not involve the same victim as Simon's extortion of Wedtech, the Lawrence extortion was within "the same series of acts or transactions," Fed.R.Crim.P. 8(b), as the extortions charged to Simon's co-defendants. Simon used Lawrence as the means of obtaining many of the benefits he derived from Wedtech, notably the $10,000 cash payment. His demand to receive benefits from Lawrence was inextricably related to his extortion of Wedtech. Proof of one scheme was helpful to a full understanding of the other. *See United States v. Turoff*, 853 F.2d at 1044.

[2] Simon's tax evasion for 1985 (Count 23) was also properly joined under Rule 8(b). *Turoff* recognized the propriety of joining tax counts to non-tax counts in mul-

ti-defendant cases where the revenue on which the tax was evaded resulted from the criminal conduct charged in the non-tax counts. *See United States v. Roselli*, 432 F.2d 879 (9th Cir.1970), *cert. denied*, 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971). The core of the tax count was the income extorted from Wedtech and Lawrence. Since a tax count deals with taxes evaded on a single year's income, it was not error in this case to join the tax count, even though it included a relatively small amount of income from the unrelated transaction involving Fogliano. *See United States v. McGrath*, 558 F.2d 1102, 1106 & n. 6 (2d Cir.1977). That principle, however, has its limits. We would have a very different case if the Government had sought to join several defendants who all extorted benefits from Fogliano and then joined a tax count that charged Simon with evading taxes not only on income from Fogliano but also on income extorted from Wedtech. But where, as here, the Wedtech extortion is central to the trial and income from it forms the core of the tax count, that count need not be severed just because it includes a small amount of unreported income from other sources.

[3] We also reject Richard Biaggi's claim that he was unfairly prejudiced by his joinder with defendants charged with the core of the Wedtech illegalities. He contends that he was placed in an untenable position of having to prove his mem-

bership in the firm of Biaggi & Ehrlich to justify his receipt of half of the five percent stock interest in Wedtech, thereby subjecting himself to the prejudicial effect of the evidence concerning the firm's activities with which he was not personally involved. However, it is obvious that even in a separate trial much of the evidence concerning the activities of the firm and of Wedtech would have been admissible in evidence to prove the circumstances concerning the five percent stock transaction.

II. Jury Selection

Appellants make two challenges to the selection of the jury. Mariotta contends that the jury selection process used in the Southern District of New York unlawfully discriminates against Blacks and Hispanics, and he and Biaggi contend that the Government's use of its peremptory challenges discriminated against Hispanics and Italian-Americans.

A. *The Southern District's Jury Plan.* The Southern District's Jury Plan uses voter registration lists as the exclusive source of names of prospective jurors. After a two-day hearing, Judge Motley found the following facts pertinent to Mariotta's claim that use of voter registration lists resulted in unlawful underrepresentation of Blacks and Hispanics. Based on 1984 figures, the percentage of Blacks in the population of the Southern District was 19.9, and the percentage of Blacks in the

Master Jury Wheel for the Manhattan seat of court was 16.3. The comparable percentages for Hispanics were 15.7 and 11.0. The disparity for Blacks, *i.e.*, the underrepresentation, was 3.6 percentage points and for Hispanics, 4.7 percentage points. *See United States v. Biaggi*, 680 F.Supp. 641, 647, 652 (S.D.N.Y.1988).

[4] 1. *Equal Protection Claim.* Focusing first on the Fifth Amendment claim, based on the equal protection component of that amendment's Due Process Clause, Judge Motley applied this Court's analysis in *Alston v. Manson*, 791 F.2d 255, 257 (2d Cir.1986), *cert. denied*, 479 U.S. 1084, 107 S.Ct. 1285, 94 L.Ed.2d 143 (1987). *Alston* read *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), to establish a three-part test for a *prima facie* case of jury discrimination amounting to a denial of equal protection: (a) a cognizable group (b) that is substantially underrepresented and (c) a selection procedure that is not racially neutral.[4] Agreeing with

4. Judge Motley questioned whether *Castaneda* established a three-part test for a *prima facie* case or required only substantial underrepresentation of a cognizable group, pointing out that the Supreme Court in *Castaneda* said that "'a selection procedure that is susceptible of abuse or is not racially neutral *supports* the presumption of discrimination raised by the statistical showing.'" *United States v. Biaggi*, 680 F.Supp. at 651 (quoting *Castaneda v. Partida*, 430 U.S. at 494, 97 S.Ct. at 1280 (emphasis added by Judge Motley)). Nevertheless, the District Judge felt bound by *Alston*. We share her doubts, but feel equally bound by *Alston*.

Mariotta that the first two elements of the test were met, findings the Government does not contest on appeal, the District Judge rejected the equal protection challenge on the ground that use of the voter registration list as the sole source of prospective jurors had not been shown to deprive the Jury Plan of racial neutrality or render it susceptible to abuse.

As Judge Motley pointed out, Mariotta made no claim that Blacks or Hispanics have been hindered in registering to vote. They have simply chosen not to register in the same proportion as Whites. That circumstance is quite different from the Texas "key man" selection system at issue in *Castaneda* or the Connecticut quota system favoring small towns with low minority populations at issue in *Alston*. Mariotta disputes that the unimpaired ability of Blacks and Hispanics to register is sufficient reason for tolerating underrepresentation resulting from use of voter lists. He relies on *Alston* and contends that in that case the minority populations in Connecticut's larger communities could have rectified their underrepresentation on the jury lists by moving in greater numbers to small towns. But the issue does not turn on the physical capacity of minorities to increase their proportion on lists used as sources for prospective jurors. Giving up one's community of residence is a major dislocation. Registering to vote is a simple task of minimal inconvenience, viewed by

many as an obligation of citizenship. The Fifth Amendment challenge was properly rejected.

[5] 2. *Sixth Amendment Claim.* Mariotta also challenged the Jury Plan as a violation of his rights under the Sixth Amendment and the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861–1869 (1988). In *Alston* we recognized that a jury selection system yielding a significant underrepresentation of a minority group in jury venires can violate the "fair cross-section" requirement of the Sixth Amendment, even if proof of discriminatory intent necessary for a Fifth Amendment violation is absent. 791 F.2d at 258; *see Duren v. Missouri*, 439 U.S. 357, 368 n. 26, 99 S.Ct. 664, 670 n. 26, 58 L.Ed.2d 579 (1979). Judge Motley correctly observed that we arguably blurred that distinction in *United States v. Young*, 822 F.2d 1234, 1239–40 (2d Cir.1987), in rejecting a Sixth Amendment challenge to a venire drawn from voter lists. *See United States v.* three Hispanics to a venire of typical size would be required to eliminate underrepresentation, and she concluded that these figures, though larger than those in *Jenkins*, "are not so great as to amount to a violation of the fair cross-section requirement." *United States v. Biaggi*, 680 F.Supp. at 655. We think the facts of this case press the *Jenkins* "absolute numbers" approach to its limit, and would find the Sixth

Amendment issue extremely close if the underrepresentations had resulted from any circumstance less benign than use of voter registration lists. Nevertheless, we agree with the conclusion reached by the District Court and reject the Sixth Amendment challenge. We also agree that rejection of the Sixth Amendment claim, in the circumstances of this case, necessarily requires rejection of the statutory claim. *Id.* at 657.

B. *The Government's Peremptory Challenges.* Mariotta contends that the Government used its peremptory challenges to exclude Hispanics, and Biaggi makes the same contention with respect to Italian-Americans. Defendants initially raised their claims immediately after the peremptory challenges were exercised. Judge Motley ordered the defendants to present their claims in written motions, a requirement the defendants acknowledged without objection. However, written motions were not submitted until after the conclusion of the trial. Judge Motley then held a two-day hearing at which one of the prosecutors was questioned extensively about the Government's reasons for challenging members of the venire with Hispanic or Italian surnames.

[9] The District Judge ruled that the defendants had shown a sufficient pattern of Government use of peremptory challenges against Hispanics and Italian-Amer-

icans to constitute a *prima facie* case of discrimination, obliging the Government to demonstrate neutral explanations for its challenges. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *United States v. Alvarado*, 891 F.2d 439 (2d Cir.1989), *vacated on other grounds*, 58 U.S.L.W. 3815 (U.S. June 25, *Biaggi*, 680 F.Supp. at 653–54. Yet, as she also pointed out, *Young* and *Alston* are reconcilable, *id.* at 654, and we agree with Judge Motley that discriminatory intent is not an element of a Sixth Amendment "fair cross-section" claim.

[6] The District Judge rejected Mariotta's Sixth Amendment claim on the ground that the degree of underrepresentation was not great enough to violate the "fair cross-section" requirement. In reaching that conclusion, she applied the so-called "absolute numbers" approach, used by this Court in *United States v. Jenkins*, 496 F.2d 57 (2d Cir.1974), *cert. denied*, 420 U.S. 925, 95 S.Ct. 1119, 43 L.Ed.2d 394 (1975). In *Jenkins*, we deemed an underrepresentation too small to violate Sixth Amendment standards where proper representation would have required the addition of only one member of the minority group to a typical venire of 60 persons. Though the "absolute numbers" approach has been called into question, *see Alston v. Manson*, 791 F.2d at 259, we have recently reaffirmed its use. *United States v. Rosar-*

*io*, 820 F.2d 584, 585 & n. 1 (2d Cir.1987); *see Anderson v. Cassles*, 531 F.2d 682, 685 & n. 1 (2d Cir.1976). The risk of using this approach is that it may too readily tolerate a selection system in which the seemingly innocuous absence of small numbers of a minority from an average array creates an unacceptable probability that the minority members of the jury ultimately selected will be markedly deficient in number and sometimes totally missing. Of course, the Sixth Amendment assures only the *opportunity* for a representative jury, rather than a representative jury itself, *see Roman v. Abrams*, 822 F.2d 214, 229 (2d Cir.1987), *cert. denied*, — U.S. ——, 109 S.Ct. 1311, 103 L.Ed.2d 580 (1989); *McCray v. Abrams*, 750 F.2d 1113, 1124–25 (2d Cir. 1984), *vacated and remanded*, 478 U.S. 1001, 106 S.Ct. 3289, 92 L.Ed.2d 705 (1986), but that opportunity can be imperiled if venires regularly lack even small numbers of minorities necessary to reflect their proportion of the population.

[7, 8] In this case, Judge Motley found that addition of two Blacks and two to 1990). The Government had challenged four of the six Hispanics and five of the six Italian–Americans chosen for the regular jury, and two of the four Hispanics chosen for service as alternates. Judge Motley then found that the prosecution's explanations for its challenges were neutral and not pretextual, and satisfactorily rebutted the claim of discrimination. These findings

have considerable support in the record and are not clearly erroneous. *See United States v. Biaggi*, 853 F.2d 89, 96 (2d Cir. 1988), *cert. denied*, — U.S. ——, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989).

[10–12] Two aspects of the *Batson* claim merit brief additional comment. First, *Batson* objections should be entertained and adjudicated during the process of jury selection. Though the District Court's preference for written motions in a complex trial is understandable, that preference must give way to the need to resolve a *Batson* claim at the point where prompt corrective action can be taken if the claim is successful. "We recognized in *McCray* [*v. Abrams*, 750 F.2d 1113 (2d Cir.1984),] and *Roman* [*v. Abrams*, 822 F.2d 214 (2d Cir.1987),] that the prosecutor's unwarranted exclusion of cognizable groups should be remedied on the spot, without waiting to see the ultimate composition of the jury." *United States v. Alvarado*, 891 F.2d at 445. Postponing consideration of a *Batson* claim until the trial is in progress, or even completed, as in this case, risks infecting what would have been the prosecutor's spontaneous explanations with contrived rationalizations, and may create a subtle pressure for even the most conscientious district judge to accept explanations of borderline plausibility to avoid the only relief then available, a new trial. *Cf. United States v. Tunnessen*, 763 F.2d 74, 78 (2d Cir.1985) (requiring contempora-

neous statement of "ends of justice" continuance under 18 U.S.C. § 3161(h)(8)(A) (1988) to guard against risk that district judge "may simply rationalize his action long after the fact"). The postponement of the *Batson* inquiry is no ground for complaint in this case, however, because the defendants did not object to the requirement of a written motion and did not present the motion until the end of the trial.

[13, 14] Second, though we accept the District Court's findings as to the prosecution's neutral explanations, we reject the Government's effort to bolster its denial of discrimination by showing how closely the ethnic composition of the jury resembled that of the venire from which it was selected. The composition of the jury may be relevant to rebutting a claim of discrimination in the trial court, *see United States v. Biaggi*, 673 F.Supp. 96, 107 (E.D.N.Y.1987), *aff'd*, 853 F.2d 89 (2d Cir 1988), *cert. denied*, — U.S. ——, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989), but the pertinent comparison is between the jury as selected and the racial or ethnic composition of the population of the judicial district, not the composition of the venire drawn for the particular case, *id.* The latter might contain an underrepresentation of a cognizable group compared to the pertinent population. *Cf. United States v. Jenkins*, 496 F.2d at 65. In this case, however, Hispanics were in fact 11.2 percent of the venire, compared to

15.7 percent of the Southern District population.

III. Challenges to the Sufficiency of the Evidence

A. *The Five Percent Stock Interest.* Richard Biaggi was convicted only of offenses related to the five percent stock interest. He was convicted (a) of aiding and abetting his father's commission of bribery and gratuity offenses based on the stock interest, (b) of mail fraud based on fraudulent concealment of his father's ownership of half of the five percent stock interest (112,500 shares), and (c) of filing false income tax returns by overstating his income to include on his 1983 return receipt of the 112,500 shares and on his 1985 return receipt of gain from the sale of one-third of these shares. He contends that the evidence is insufficient to show that he aided and abetted the bribery and gratuity offenses of his father that were based on the stock interest. For purposes of this appeal, he concedes that the evidence sufficed to show that the Congressman committed bribery and gratuity offenses with respect to the stock. His primary point is that there is insufficient evidence to show that he knew the stock was issued to influence his father in his official duties (bribery) or because of his father's performance of official acts (gratuity). He also contends that the evidence is insufficient to

show that he was holding the 112,500 shares as nominee for his father.

[15] Taking these claims in reverse order, we are satisfied that there was sufficient evidence that Richard was holding his father's 112,500 shares as a nominee. The demands by Biaggi and by Ehrlich for Wedtech stock began in 1981. Moreno testified that when Ehrlich became aware of Moreno's nine percent stock interest, he pressed Moreno to honor what he alleged was a prior promise by Mariotta to issue some stock to Biaggi & Ehrlich. In a conversation in 1982, Biaggi made a demand for a five percent override on all contracts that he "could help bring into the company." Wedtech officials rejected that demand, but suggested that they could pay the firm five percent of the subcontracts resulting from such contracts. At this meeting they agreed to issue five percent of Wedtech stock to the firm. There is no evidence that Richard Biaggi was present at or informed of any of the discussions at which the five percent stock interest was demanded or agreed to.

In 1983, in anticipation of the public offering of Wedtech's stock, Biaggi and Ehrlich pressed Wedtech to issue their promised stock interest. An early draft of the agreement for the share transfer provided that 225,000 shares (five percent) would be granted to the law firm of Biaggi & Ehrlich. Later in 1983, Biaggi, Ehrlich, and

Richard met with Irwin Wolf, Biaggi's tax accountant, to discuss how the 225,000 shares would be handled. Wolf testified that the law firm was to receive "fees in kind, namely, the stock of the corporation." Wolf was asked whether the Congressman could retain ownership if the shares were issued in the name of the law firm. Wolf said that was not possible because the Congressman had sold his interest in the firm in 1979. Wolf was then asked about the consequences of placing the Congressman's shares in his own name. Wolf said that, if that occurred, the issuance of the shares would be income to the Congressman in 1983 and that the receipt of such income might put him over the statutory cap on outside earnings. By House Rule XLVII, effective after December 31, 1978, that cap was 30 percent. After these alternatives were rejected, the conclusion was reached "that the stock would have to be registered in the name of Richard, because there didn't seem to be any other alternative." Thereafter, Ehrlich and Richard were each issued 112,500 shares.

Evidence of events after the shares were received supports a finding that Richard was holding his father's stock. In late 1983, when it was proposed that Richard transfer some of the shares to Mariotta to support his claim of Wedtech's entitlement to section 8(a) eligibility, the Congressman decided that the shares would be transferred, despite Richard's objection, and the

Congressman dictated special terms, not applicable to other transferors, for the "default" provisions of the transfer to Mariotta. When Richard sold one-third of the shares in 1985, he retained nearly all the proceeds, after using enough for taxes, in a money market account paying approximately seven percent interest, even though he was then paying fourteen percent interest on two mortgage loans. Finally, the evidence undermined any claim that Richard could possibly have been entitled to the 112,500 shares as a member of the firm. When the stock was issued, he had been a lawyer for only nine months, he did little work on the Wedtech account, and he was not listed as a partner in the firm until 1985.

[16] Though the evidence amply supports a finding that Richard held the stock as nominee for his father, it fails to support a finding, crucial to Richard's bribery conviction, that he knew the shares were issued for his father's benefit in return for his father's being influenced to assist Wedtech as a Congressman. There was no evidence that Richard heard any of the statements that supported the finding that the stock was a bribe and an extortion, such as the Congressman's demand for five percent of contracts he brought to Wedtech, a demand that accompanied the negotiation of the five percent stock interest, and the threatening remark that the Congressman could destroy the company.

The Government contends that Richard must have known that the shares were issued to his father for an unlawful purpose because, according to the Government, their value of $1,800,000 exceeded the value of any legal services rendered by the law firm. This speculation is unsupportable. Though the public offering price was $16 per share, the shares issued to Ehrlich and Richard contained a restriction precluding sale within two years. There is dispute as to the value of the restricted shares when issued, but there is no evidence that in 1983 anyone was willing to pay anything near $1,800,000 for 112,500 shares that could not be sold until 1985. The accountants who prepared the 1983 tax returns for Ehrlich and Biaggi valued the 112,500 shares at $34,000, apparently using a book value supplied by Wedtech. Even if the value in fact was somewhat higher, there is no evidence that the value was so high, in relation to the value of past services rendered by the firm, as to lead Richard to believe that the shares must have been issued for an unlawful purpose.

There is sufficient evidence, unchallenged by Biaggi or Ehrlich, that *they* knew why the shares were issued. And it is possible that the Congressman told his son the true reason. But knowledge, though inferable from circumstances, must be based on evidence, not speculation. What little evidence exists as to Richard's knowledge would have supported a finding

that he knew that his father's stock was put in his name to circumvent the limits on a Congressman's outside income. Had Richard been charged with aiding and abetting a violation of that restriction, a conviction could stand. But the evidence did not permit a rational jury to find beyond a reasonable doubt that Richard knew that his father received the shares as a bribe or a gratuity, and without evidence of such knowledge, Richard's conviction for aiding and abetting the bribery and the gratuity may not stand. *See United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir.1985) (aider and abetter must have the mental state necessary to convict the principal); *United States v. Perry*, 643 F.2d 38, 46 (2d Cir.) (same), *cert. denied*, 454 U.S. 835, 102 S.Ct. 138, 70 L.Ed.2d 115 (1981).

[17-20] The reversal of these counts, however, does not affect Richard's conviction on the two counts charging the filing of false income tax returns. Since the evidence sufficed to show Richard's knowledge that the shares were owned by his father, he was properly convicted of overstating his income to include receipt of the shares and the subsequent profit from their sale. The false tax return counts require knowledge only of the true ownership of the shares, not of the unlawful purpose for which they were issued. As to the mail fraud count, the Government advises only that since Richard's attack on his mail fraud conviction "rests" on his chal-

lenge to the bribery and gratuity convictions, it will not "address the mail fraud count separately." Brief for Appellee at 63 n. *. This appears to concede that Richard's mail fraud conviction cannot survive reversal of his bribery conviction, and the mail fraud conviction will therefore be reversed. Reversal of Richard's bribery, gratuity, and mail fraud convictions results in vacation of the $51,000 in fines imposed on those counts but does not reduce his sentence since he received concurrent two-year sentences. Nevertheless, since the District Judge may well have regarded the tax return offenses as aggravated because of their relation to the bribery offense, we think there should be an opportunity for resentencing on the tax return counts, now that the bribery conviction has been reversed. *See United States v. Sperling*, 506 F.2d 1323, 1343 (2d Cir.1974), *cert. denied*, 420 U.S. 962, 95 S.Ct. 1351, 43 L.Ed.2d 439 (1975); *United States v. Rizzo*, 491 F.2d 1235, 1236 (2d Cir.1974).

The Government contends that this opportunity for reconsideration of the sentence should not be afforded, pointing out that we have previously denied the Government's request to permit reconsideration of a sentence claimed to be lenient where conviction on a count carrying a more severe sentence is reversed. *See United States v. Pisani*, 787 F.2d 71 (2d Cir.1986). We are not persuaded that claims for reconsideration of sentences must be treated symmet-

rically. A sentencing judge has the option of imposing a sentence of adequate severity on a less serious count no matter what happens to the sentence on a more serious count. An opportunity to consider increasing a sentence on a minor count after a sentence on a major count is vacated is not required. *See id.* at 75–76. But the initial sentence on a comparatively minor count may well have been influenced upwards in part by a defendant's conviction on serious charges, and the reversal of a conviction on such charges should afford an opportunity for consideration of a reduction of the sentences on the remaining counts, unless the sentencing judge's intent to scale sentences according to the seriousness of the several offenses is clear.

[21] B. *The $50,000 Loop Drive Payment.* Ehrlich contends, in an argument that applies as well to Biaggi and Mariotta, that the evidence is insufficient to show that the $50,000 Loop Drive payment was unlawful. It is undisputed that Biaggi & Ehrlich billed Wedtech $50,000 for legal services rendered in connection with the leasing of the Loop Drive property from New York City. That payment formed the basis of Biaggi's convictions for extortion, accepting a bribe, and mail fraud, Ehrlich's convictions for aiding and abetting these offenses, and Mariotta's conviction for bribing Biaggi. The mail fraud convictions rested on the alleged falsity of the law firm's bill in stating that it was rendered

for legal services. The issue as to the criminality of the payment is whether the demand for the payment was extortion by Biaggi and whether the payment was a bribe of Biaggi, as the Government contends, or whether the payment was sought and made lawfully as a fee for legal services, as appellants contend. The issue presents difficulties because this case is not the garden variety of extortion/bribery in which a payment is made to a public official who has no colorably lawful claim to it. Where a federal law enforcement officer is paid cash, for example, it will usually be clear that the payment is unlawful; the payment will at least be a gratuity if paid because of his official act, 18 U.S.C. § 201(c)(1)(B), it will be a bribe if paid in exchange for his being influenced in his duties, *id.* § 201(b)(2)(A), and it will be extortion if he demanded it under color of official right, *id.* § 1951(b)(2). However, a payment to a law firm is normally a legitimate payment for services rendered, and the payment does not necessarily become unlawful because the firm used its political contacts to assist its client in a matter that requires governmental approvals, in addition to rendering traditional legal services such as negotiating and drafting a lease. Distinguishing between a lawful fee and an unlawful bribe or extortion is further complicated in this case because the payment alleged to be a lawful fee was received by a firm with which Congressman Biaggi main-

tained an "of counsel" relationship and in which his son was initially employed and later a partner.

In their approach to the issue, both sides overstate their contentions. The Government asserts that the $50,000 "cannot be viewed as a simple request for compensation for services rendered" because the law firm "was already handsomely compensated by virtue of its $150,000 retainer." Brief for Appellee at 56. Yet it is not uncommon in the practice of law for legitimate legal fees to be paid in addition to an annual retainer where a law firm handles special tasks and accomplishes significant results. In this case, it is undisputed that lawyers at the firm, particularly Ehrlich and his associate, Carlos Cuevas, Jr., performed legal tasks in negotiating the favorable terms of the Loop Drive lease and drafting its provisions. Though the work was done in a matter of days, it had to be done on an expedited basis and entailed long hours. The lawyers' efforts obtained for their client a waterside property that was essential to performance of a multimillion dollar contract and did so at an annual saving in rent of $75,000 below the City's asking price for the three-year lease. Appellants contend that the $50,000 was a proper legal fee earned by the firm—as lawful as the $5,000 bonus that Moreno gave to Cuevas, a payment the Government does not challenge.

On the other hand, appellants overstate the matter in urging that the $50,000 was solely for services already rendered and therefore could not have satisfied either the *quid pro quo* element of a bribe or the inducement element of an extortion. The law firm's bill was dated June 19, 1984. The demand for payment and Moreno's agreement on behalf of Wedtech to pay the fee must have occurred before this date.[5] After this date, important steps remained to be taken to assure Wedtech that the lease would be approved. When two members of the Board of Estimate, City Controller Harrison Goldin and Queens Borough President Donald Manes, objected at the Board's June 13 meeting to expedited consideration of the lease the next day, efforts were made to secure approval at a subsequent meeting. Biaggi called Goldin and Simon, and Richard Biaggi asked Simon to talk to Manes. As reported by Ehrlich to Moreno, the Congressman believed that Simon was at fault for not getting the lease on the Board's June 14 agenda, and he talked to Simon about obtaining approval at a subsequent meeting. In Mor-

5. Guariglia testified that, after he learned of the agreement to pay the fee, he instructed the firm to refer to the lease in the invoice so that the fee could be amortized over the term of the lease. Though it is possible that the invoice was backdated, as Ehrlich suggests, Reply Brief for Ehrlich at 6, the jury was entitled to conclude that it was sent on June 19 and that the agreement as to its amount was reached sometime earlier.

eno's words, Biaggi "had punished [Simon] ... had told him that his next election depended on Mario Biaggi's support and that he had to start moving really quick." The $50,000 bill was paid the day after the July 12 meeting of the Board of Estimate.

[22-26] It thus appears, and surely the jury was entitled to find, that the $50,000 payment had two purposes. It was sought in part as compensation for legal services rendered by the law firm. But in part it was also a payment demanded by Biaggi (and directed to his son's firm) to obtain his assistance as a public official in securing favorable action from other public officials. Biaggi expected to be influenced by the payment to render such assistance, thereby satisfying the *quid pro quo* element of bribery and he obtained the payment, at least in part, by virtue of the action he could be expected to take as a Congressman, thereby satisfying the inducement element of extortion. Only two years previously, in connection with the demand for the five percent stock interest, Biaggi had reminded Wedtech officials that he had "brought up the company to the point it was" and "could also destroy it." Thus, the issue as to the $50,000 payment becomes whether a payment may be found to constitute a bribe and an extortion where it is sought and paid for both lawful and unlawful purposes. We think it may. A valid purpose that partially motivates a transaction does not insulate participants in

an unlawful transaction from criminal liability. For example, if a Congressman demands a payment for taking official action as to a matter that requires some legal services, his demand is nonetheless extortion if he instructs the payer to retain his son's law firm for the needed legal services and to pay a sum for both the firm's legal services and his own official action. In such cases, however, the evidence must suffice to permit the jury to find beyond a reasonable doubt that the unlawful purposes were of substance, not merely vague possibilities that might attend an otherwise legitimate transaction. A client paying his law firm's legal fee does not commit bribery simply because a Congressman is "of counsel" to the firm and the client hopes the Congressman will some day be helpful. In some cases of payments to service providers who hold public office, the evidence has been deemed insufficient to show any purpose for a payment other than a lawful one. *See United States v. O'Keefe*, 825 F.2d 314, 319–20 (11th Cir.1987).

[27] In the pending case, several factors permitted the jury to find the $50,000 payment unlawful. It followed a prior extortionate demand by Biaggi and Ehrlich for a five percent stock interest. It was discussed with a Congressman while matters were pending on which the Congress-

man's assistance was urgently needed.[6] The bill was submitted just one week after the need for the Congressman's assistance became apparent. The bill was paid the day after the governmental action on which the Congressman had assisted. The bill was not accompanied by normal law firm time records and, though perhaps justified in part by the legal services rendered, was

6. Appellants dispute that Biaggi's contacts with Board of Estimate members occurred after the demand for the $50,000. They point to Moreno's testimony quoting Ehrlich as saying that a lot of extra work had been done to convince the Board members, especially Manes. But this statement was made in the context of explaining why the firm's retainer did not cover the additional services and was not necessarily made before those services were rendered nor when the extra payment was first demanded. Though the Government's statement of facts says that Ehrlich demanded the payment after the Board's approval, Brief for Appellee at 34, the fact that the check was dated just one day after the approval and was in response to an invoice dated a month before the Board's July 13 meeting permitted the jury to find that the demand was made before Biaggi garnered the needed votes.

Alternatively, appellants contend that if the demand preceded the June 19 invoice, it could not have been in anticipation of Biaggi's assistance because, they contend, the first indication that the lease would not be approved expeditiously by the Board, and that Biaggi's assistance was needed, did not occur until the Board's meeting on June 27. However, Cuevas testified that the first indication of opposition occurred on June 13, when an attempt was made to have the matter calendared for action the next day.

in addition to a substantial retainer. Under all the circumstances the jury was entitled to conclude that the $50,000 was demanded and paid, at least in part, to obtain the political services of Congressman Biaggi. Though it would be helpful in cases like this, where a payment appears to have a lawful purpose in addition to its allegedly unlawful purpose, to focus the jury's attention on the special problems presented by the possibilities of dual motivation, no special charge language was requested on this point. Appellants' complaint is solely that the evidence was insufficient for conviction, and we conclude that it suffices.

C. *Neglia's Bribery Offense.* Neglia mounts a substantial challenge to his bribery conviction on the ground that the evidence showed at most a gratuity violation and did not establish the *quid pro quo* necessary to establish a bribery violation. *See United States v. Myers*, 692 F.2d 823, 841 (2d Cir.1982), *cert. denied*, 461 U.S. 961, 103 S.Ct. 2437, 77 L.Ed.2d 1322 (1983). A public official commits a gratuity violation when he accepts something of value, here the promise of a job, "for or because of any official act performed or to be performed." 18 U.S.C. § 201(c)(1)(B). He commits a bribery violation when he accepts something of value "in return for (A) being influenced in the performance of any official act." *Id.* § 201(b)(2). Neglia contends that the job was promised "in gratitude for past services." Brief for Neglia

at 69. Testimony of Moreno, Neuberger, and Shorten supports Neglia's claim that the job was promised as a reward for prior assistance.

The Government contends, however, that the job was promised not only as a reward for past services but also in return for being influenced in the performance of official duties in the future. We have recognized, especially with respect to public officials, that evidence of the receipt of benefits followed by favorable treatment may suffice to establish circumstantially that the benefits were received for the purpose of being influenced in the future performance of official duties, thereby satisfying the *quid pro quo* element of bribery. *See United States v. Friedman*, 854 F.2d 535, 554 (2d Cir.1988), *cert. denied*, — U.S. ——, 109 S.Ct. 1637, 104 L.Ed.2d 153 (1989).[7] After learning of the job promise in the fall of 1984, Neglia acted to assist Wedtech in forestalling its decertification from the section 8(a) program. First, he showed Wedtech officials a copy of a confidential letter Congressman Parrin Mitchell had sent the SBA Administrator raising questions about Wedtech's continued section 8(a) eligibility. Next he assured Moreno that the response to a subsequent inquiry from Mitchell to the SBA would be prepared "in a form that would not hurt Wedtech." Later he told Moreno and Ehr-

7. What jury instruction is appropriate in such circumstances is considered at part V(A), *infra*.

lich that "he could help" in delaying the process of decertification.

[28] Whether this evidence suffices is a close question. This is not the usual bribery case where a public official accepts cash or some other valuable benefit that is obviously improper. Public officials regularly leave government service to return to private employment and on occasion discuss and formalize private employment opportunities while still in government service. Where that occurs, a specific conflict-of-interest statute prohibits the public official from participating in a matter in which the prospective employer has a financial interest. 18 U.S.C. § 208 (1988). Clearly Neglia's involvement in Wedtech matters after the promise of future employment at Biaggi & Ehrlich violated section 208, since, in the words of the statute, Wedtech had an "arrangement concerning prospective employment" by virtue of its promise to pay one half of Neglia's salary at the law firm. *See id.* § 208(a). But the issue here is whether the arrangement and the activity of Neglia escalated his offense beyond conflict of interest into bribery. That issue is close not only because a job promise is not unlawful under all circumstances but also because it was part of Neglia's duties as an SBA official to assist companies participating in the section 8(a) program.

[29] Nevertheless, we are satisfied that the evidence permitted the jury to find that Neglia accepted the job promise in return for being influenced in his duties. Prior to the job promise, Neglia had already rendered unlawful assistance to Wedtech, countenancing the sham stock arrangements that misrepresented Mariotta's majority interest in Wedtech and thereby perpetuated the company's participation in the 8(a) program. Some indication that Neglia understood that Wedtech had agreed to contribute to his salary at Biaggi & Ehrlich in the expectation of his continued assistance is inferable from Moreno's statement to Neglia: "We always take care of our friends when they are in government and we never forget them after they leave government." When Neglia was told by Moreno that the initial threat of an investigation by Congressman Mitchell had been "taken care of," Neglia asked, "How did you do it?" and was told, "[T]here is no need for you to know." Neglia never alerted the SBA to these clear indications of improprieties. In fact, the initial investigation was deflected after a payment by Wedtech of $50,000 to Congressman Mitchell's nephews. From all of the evidence the jury could reasonably find that the job promise was more than a gratuitous offer of post-government employment, it was a bribe accepted by Neglia in exchange for his willingness to be influenced in performing his duties for Wedtech's benefit.

[30] D. *Neglia's RICO Conviction.* Neglia challenges his conviction on the RICO substantive count on the ground that, in the circumstances of this case, his predicate acts of accepting a bribe and obstructing justice are insufficient to establish the requisite pattern of racketeering activity.[8] We agree. Predicate act 9 charged the same conduct constituting the bribery offense charged in Count 28—namely, accepting a promise of employment at Biaggi & Ehrlich, with half of his salary to be paid by Wedtech, after he left government employment. Predicate act 15 charged the same conduct constituting the obstruction of justice offense charged in Count 30—namely, making false statements "concerning Wedtech and his relationship with B & E" to a Defense Department investigator in preparation for Neglia's appearance before a grand jury.

8. With respect to the RICO substantive offense, the jury found that Neglia committed three predicate acts—bribery and accepting a gratuity (both of which were based on the promise of future employment) and obstruction of justice. Since the gratuity offense is lesser included within the bribery offense, the bribery and obstruction offenses are the only two predicate acts available to establish the RICO pattern element as to Neglia. With respect to the RICO conspiracy offense, the jury found the obstruction offense not proven, leaving only the bribery offense as a predicate act. As Judge Motley recognized, this single predicate act could not support a RICO conspiracy offense as to Neglia.

[31–33] Preliminarily, as Neglia notes, had the Government charged his false statements as a violation of 18 U.S.C. § 1001 (1988), that offense would not have been eligible for use as a RICO predicate act because section 1001 violations are not within the offenses that define "racketeering activity." *See* 18 U.S.C. § 1961(1). By charging the false statements as obstruction of justice in violation of 18 U.S.C. § 1503, the Government was able to identify an offense within the category of "racketeering activity." But the fact that an obstruction offense is eligible for use to establish a RICO pattern does not necessarily mean that it suffices in every case. The Government already charges with a heavy hand when it alleges in one count the acceptance of a bribe and in another count the false denial of that same bribe.[9] Before we will countenance a further escalation in the maximum sentence by the addition of a RICO charge, we would have to be persuaded that Congress intended that a bribe and the false denial of that same bribe would satisfy the "pattern" element of a RICO offense. *See* 18 U.S.C. § 1962(c). We are not so persuaded.

9. It should be pointed out that in framing the indictment, the Government did not seek to justify the RICO charge against Neglia solely with the two predicate acts of bribery and obstruction. The indictment charged Neglia with three other predicate acts, all of which the jury found were not proven.

[34] Despite the Government's frequent preference to charge a RICO violation whenever evidence indicates two eligible offenses, RICO was not enacted as an automatic sentence enhancement device. If Congress wants the maximum penalty for bribery to be 20 years, it may so provide, but we do not believe a prosecutor can accomplish that result by providing a bribe taker with an opportunity to deny the bribe, and then allege the bribe and the false denial as a RICO "pattern." We have recently made it clear that proof of two predicate acts "without more" does not suffice to establish a RICO pattern. *United States v. Indelicato*, 865 F.2d 1370, 1381 (2d Cir.) (in banc), *cert. denied*, — U.S. ——, 110 S.Ct. 56, 107 L.Ed.2d 24 (1989). Neglia contends that the bribe and the false denial, though obviously bearing the requisite "relationship" to each other, *see Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 3285 n. 14, 87 L.Ed.2d 346 (1985), lack the requisite "continuity" to establish a "pattern." That may well be so, but the more basic objection is that aggregating the bribe and its denial into a "pattern" perverts the meaning of that word, at least as it is used in the RICO statute. The "pattern" element guards against permitting RICO to be used against sporadic criminal activity. Neglia's bribe does not cease to be a sporadic offense simply because he later falsely denied committing it. If the commission of

an offense and its false denial could establish a "pattern," then *every* offense related to a criminal enterprise would be eligible for inclusion in a pattern whenever the offender falsely denied its commission. That is not what Congress intended.

The Government endeavors to draw support for its position from *United States v. Teitler*, 802 F.2d 606 (2d Cir.1986), pointing out that we there did not suggest any deficiency in a pattern established by a mail fraud offense and an obstruction of justice involving an attempt to induce false grand jury testimony. It is one thing to build a pattern out of an offense followed by an attempt to persuade grand jury witnesses to lie; it is quite a different matter to aggregate an offense and the offender's own false denial of it. In the former case, the offender extends his criminal conduct beyond a denial of wrongdoing. He enlists others into a corruption of justice. In the latter case, the offender simply maintains his innocence. The fact that his denial is false may warrant some enhancement of punishment for his criminal conduct within the statutory range established for his offense, *see United States Sentencing Guidelines* § 3C1.1 (Nov. 1989) (two-level enhancement for obstructing justice); *cf. United States v. Grayson*, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978) (enhancement for perjury committed at trial), and might, in an extreme case, warrant additional punishment for the separate offense

of obstruction. But the false denial does not convert the two offenses into a distinct RICO offense.

[35] The reversal of Neglia's RICO conviction reduces his aggregate fine by the $10,000 specifically imposed on the RICO count, since his fines were cumulated, but does not necessarily alter his term of imprisonment, since he received concurrent three-year terms on the RICO and the bribery counts. Nevertheless, as with Richard Biaggi's sentence, we think the District Judge should have an opportunity to reconsider Neglia's sentences imposed for the bribery and obstruction offenses, now that these offenses are no longer accompanied by a conviction for the more serious RICO offense.

[36] E. *Neglia's Obstruction of Justice Conviction.* Neglia contends that the evidence failed to show an obstruction of justice because his statements to a Department of Defense investigator, which constituted the offense, amounted to no more than an "exculpatory no." That doctrine has provided a defense to false statement prosecutions under 18 U.S.C. § 1001 under some limited circumstances. *See United States v. Medina De Perez*, 799 F.2d 540, 543–44 (9th Cir.1986). Even if the doctrine applies to obstruction offenses under 18 U.S.C. § 1503, a matter we do not decide, it would not assist Neglia. We have indicated that the doctrine, if applicable in this

Circuit, would have an extremely narrow scope even as to section 1001 offenses. *See United States v. Capo*, 791 F.2d 1054, 1069 (2d Cir.1986), *vacated in part on other grounds*, 817 F.2d 947 (2d Cir.1987) (in banc). In *Capo*, we expressed doubt that any statement beyond a simple "no" would fall within the exception. 791 F.2d at 1069. Neglia's responses to the investigator went beyond bare denials of wrongdoing. He manufactured a false version as to how he happened to handle work for Biaggi & Ehrlich after he left the SBA and was actively misleading with respect to his discussions with Ehrlich.

[37] F. *The Section 8(a) Fraud.* Mariotta challenges his mail fraud convictions based on the section 8(a) fraud on the ground that he was not shown to have devised a scheme to deprive a victim of money or property. Count 31 charged him with mail fraud by misrepresenting his majority interest in Wedtech before the public offering of stock, and Count 13 charged a similar misrepresentation with respect to the sham stock purchase agreements. Both counts alleged a scheme to defraud "the DOD [Department of Defense] of its right to award millions of dollars in Section 8(a) contracts." Mariotta contends that these schemes allege and were shown to involve no more than a deprivation of intangible rights, which he asserts does not constitute mail fraud after *McNally v. United*

*States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987).

*McNally* required a scheme intended to deprive a victim of money or property, but did not preclude deprivation of intangible property rights, as the Supreme Court made clear in *Carpenter v. United States*, 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987). We agree with Judge Motley, *see United States v. Biaggi*, 675 F.Supp. 790, 801–02 (S.D.N.Y.1987), that Mariotta's schemes were actionable mail frauds that deprived the Department of Defense of its property right to control the award of section 8(a) contracts, even though DOD used the services of SBA to administer the section 8(a) program. *See United States v. King*, 860 F.2d 54, 55 (2d Cir.1988) (mail fraud involving public funds), *cert. denied*, — U.S. ——, 109 S.Ct. 2062, 104 L.Ed.2d 628 (1989); *Ingber v. Enzor*, 841 F.2d 450, 455–56 (2d Cir.1988) (mail fraud involving public contract awarded upon concealment of conflict of interest).

[38–40] G. *Simon's $50,000 Payment.* In his reply brief, Simon contends that the evidence was insufficient to permit the jury to find him guilty of extortion and related RICO predicate acts in connection with the $50,000 payment solicited at the Yonkers Raceway benefit for the Riverdale Hebrew Home. He argues that though Neuberger testified that the payment was demanded in June 1984, just prior to the Board of

Estimate vote on the Loop Drive lease, the only evidence that could rationally be believed beyond a reasonable doubt established that the Hebrew Home benefit attended by Simon and Neuberger occurred in November, not June. His point is that the demand for $50,000 in November could not have been misuse of his office in connection with the Loop Drive lease, which was approved by the Board of Estimate in July.

Simon's sufficiency challenge fails both because it was not preserved at trial and because of the nature of the factual issues presented to the jury. In his Rule 29 motion for a directed verdict at the close of the evidence, Simon initially raised his current claim that the Neuberger testimony about a June meeting was conclusively refuted by records and photographs showing the attendance of Simon and Neuberger at the November benefit for the Hebrew Home, not the earlier June benefit. Opposing Simon's motion, the Government took the position that if the demand for $50,000 was made in June, it related to the upcoming Board of Estimate vote in July, or, alternatively, if it occurred in November, it was nonetheless extortionate because of its relationship to Simon's continued dealing with New York City officials in connection with completion of the Loop Drive transaction and acquisition of an additional property. Counsel for Simon then told Judge Motley that if the Government was going

to argue that the meeting occurred in June, "that is an issue of fact for the jury." He concluded, "If that is what [the prosecutor] is representing to the Court, then deny my motion."

In its summation, the Government briefly adverted to Neuberger's recollection of the meeting as having occurred in June but essentially accepted the defense contention that the benefit that Simon and Neuberger attended had occurred in November. The prosecutor argued that Neuberger could not be expected to remember the precise date of the benefit, that Ceil Lewis had placed the meeting in November, and that the first check paid in response to Simon's demand was dated November 27. "It probably was the November meeting," the prosecutor acknowledged. Rather than claim that the meeting happened in June, the prosecutor argued that it made no difference whether the extortionate demand was made at a meeting in June or November because in November the Loop Drive lease, though approved by the Board of Estimate, still had not been executed and Simon's help was needed to complete the transaction. Simon's summation maintained that Simon and Neuberger had attended only the November benefit and that no demand for money had been made at that time or at any other time. His defense was that at Simon's home the following January Neuberger volunteered to make political contri-

butions. Thus, the jury was never called upon to determine whether the meeting occurred in June; the fact issue was whether at the November meeting a demand for $50,000 had been made. If it was, as the jury evidently found, there was ample evidence that it was an extortionate demand, induced by misuse of office.[10]

## IV. Conduct of the Trial

All defendants allege a variety of errors occurring during the course of the trial. We consider those raising issues of arguable merit.

A. *Use of Immunized Testimony.* Mariotta and Richard Biaggi contend that the prosecution made use of testimony they had given to a New York state grand jury under grants of immunity and that Judge

10. Simon also contends that in shifting from a June meeting to a November meeting, the Government has constructively amended the indictment in violation of the Fifth Amendment. The count charging Simon with extortion of $50,000 alleged conduct beginning in mid-1984 and continuing through early 1986; the RICO counts more specifically alleged that Simon's demand for $50,000 occurred in "mid-1984." In any event, the evidence of a November demand did not constitute a modification of an essential element of the offense that amounts to an amendment of the indictment, *see United States v. Weiss*, 752 F.2d 777, 787 (2d Cir.), *cert. denied*, 474 U.S. 944, 106 S.Ct. 308, 88 L.Ed.2d 285 (1985). At most, there was a non-prejudicial variance, *see United States v. Attanasio*, 870 F.2d 809, 817 (2d Cir.1989); *United States v. Heimann*, 705 F.2d 662, 666 (2d Cir.1983).

Motley erred in ruling, without holding a so-called *Kastigar* hearing, *see Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), that the Government had adequately demonstrated its independent sources for its evidence. Mariotta and Richard Biaggi testified under grants of immunity to a grand jury empaneled by the Manhattan District Attorney. The testimony was reviewed by Judge Motley. Mariotta denied knowledge or participation in any criminal conduct at Wedtech. Richard Biaggi testified concerning two episodes of bribery. One involved efforts by Wedtech and Ehrlich to make payments, through a company known as Portatech, to General Vito Castellano of the New York State National Guard. The other involved payments on behalf of Citisource, Inc. from former Bronx County Democratic Chairman Stanley Friedman, through Portatech, to Ehrlich, who was a general in the National Guard. *See United States v. Friedman*, 854 F.2d at 547–50. Judge Motley ruled, at the conclusion of the trial, that the transcripts of the testimony given under grants of immunity and the trial record in this case demonstrated, without the need for a hearing, that the Government's case was derived from sources independent of the immunized testimony.

Preliminarily, the Government contends that appellants failed to sustain their burden of showing that their immunized testi-

mony related to the charges in this case. *See Kastigar v. United States*, 406 U.S. at 460, 92 S.Ct. at 1664; *In re Corrugated Container*, 644 F.2d 70, 75 (2d Cir.1981). Mariotta's denials disclosed no fact relevant to the instant charges. Richard's testimony concerned Wedtech and bribery, but the charges in this case did not involve the Portatech bribes. The Government's evidence made fleeting and inconsequential reference to Castellano, but not to any attempt by Wedtech to bribe him. The Castellano bribe was elicited on cross-examination by counsel for Ehrlich and Richard Biaggi.

[41] Moreover, the Government established its independent source for the one Portatech document that it used during the trial, an invoice from Portatech to Wedtech that bore Richard Biaggi's home address. This document was used to cross-examine Richard's wife concerning her knowledge of her husband's business dealings. The document was obtained from Wedtech pursuant to a subpoena issued in July 1986, before Richard's state grand jury testimony in December 1986.

[42] Appellants contend that Richard's grand jury testimony and even Mariotta's denials of wrongdoing were "used" against them in the sense that they provided the motivation for the four cooperating Wedtech witnesses to testify. In *United States v. Kurzer*, 534 F.2d 511, 517–18 (2d Cir. 1976), we recognized that the self-incrimi-

nation protection assured by *Kastigar* could be violated if it were shown that a witness was motivated to come forward with evidence against a defendant because of that defendant's immunized testimony. At the same time we pointed out that the Government should have the opportunity to persuade the trial judge that the witness would have provided adverse testimony entirely apart from the motivating effect of the immunized testimony, thus applying a *Mt. Healthy* dual motivation analysis. *See Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

In this case, the cooperating witnesses were extensively questioned during the trial as to their motivations for deciding to cooperate with the prosecution and testify against the defendants. Not one of them said they were motivated by anything that Mariotta or Richard Biaggi had said to the New York grand jury. At most, their testimony indicated that their decision to cooperate was influenced not only by the prospect of extensive federal prison terms that might result from the federal investigation of which they were aware but also by the prospect of state prison terms resulting from the investigation by the Manhattan District Attorney. Such testimony did not preclude Judge Motley from finding that the Government's evidence from the cooperating witnesses was independent of the immunized testimony, *i.e.*, that it would

have been volunteered even if such testimony had not been given. Her finding is especially invulnerable in view of the fact that the motivation argument tendered by the appellants rests on a claim that the witnesses cooperated because they had heard generally about the state investigation, rather than any supportable claim that they had been motivated by anything that either Mariotta or Richard had said to the state grand jury.

Judge Motley did not err in finding no violation of the *Kastigar* principles nor in declining, after assessing the entire trial record, to hold a "*Kastigar* hearing."

[43] B. *Evidence of Mariotta's "Consciousness of Innocence."* Mariotta contends that it was error to exclude evidence of immunity negotiations that he contends was admissible to prove his "consciousness of innocence." Specifically, Mariotta sought to prove that the Government had offered him immunity if he would give what the Government regarded as truthful information regarding wrongdoing by other Wedtech officers and various public officials, and that Mariotta, in response to this offer, denied knowledge of any such wrongdoing, thereby "rejecting" immunity. The Government does not dispute that it made the offer, but contended before the District Court that the prosecution had rejected immunity for Mariotta after reaching the conclusion that the testimony he

would give, based on his denial of knowledge of wrongdoing, was not credible. Mariotta argued to the District Court that his denial of knowledge of others' wrongdoing, expressed to the Government at a time when admitting such knowledge would have secured him immunity from prosecution, is powerful evidence of "consciousness of innocence," tending to preclude a finding that he had such knowledge.

Initially, the Government disputes Mariotta's claim that he rejected immunity; in the Government's view, it was the Government that rejected immunity. The distinction is of no moment. Even on the Government's view of the matter, it rejected immunity because Mariotta did not come forward with incriminating evidence about Wedtech officers and public officials. But that is precisely the point Mariotta wanted the jury to know: that he had a chance to gain immunity for himself if he told the Government about the wrongdoing of Wedtech officers, and that he denied knowledge of such wrongdoing at a time when admitting he had such knowledge would have assured him immunity. The available inference is that he really lacked such knowledge, as he claimed throughout the trial. The inference is the same whether the immunity offer is viewed as "rejected" by Mariotta's inability to satisfy the Government's condition or "rejected" by the

Government's assessment that its condition was not satisfied.

The Government also contends that evidence of immunity negotiations should be excluded because of the same considerations that bar evidence of plea negotiations. Preliminarily, we note that plea negotiations are inadmissible "against the defendant," Fed.R.Crim.P. 11(e)(6); Fed.R.Evid. 410, and it does not necessarily follow that the Government is entitled to a similar shield. More fundamentally, the two types of negotiations differ markedly in their probative effect when they are sought to be offered against the Government. When a defendant rejects an offer of immunity on the ground that he is unaware of any wrongdoing about which he could testify, his action is probative of a state of mind devoid of guilty knowledge. Though there may be reasons for rejecting the offer that are consistent with guilty knowledge, such as fear of reprisal from those who would be inculpated, a jury is entitled to believe that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacks knowledge of wrongdoing. That the jury might not draw the inference urged by the defendant does not strip the evidence of probative force. *See United States v. DiMaria*, 727 F.2d 265, 271–72 (2d Cir.1984).

Rejection of an offer to plead guilty to reduced charges could also evidence an innocent state of mind, but the inference is not nearly so strong as rejection of an opportunity to preclude all exposure to a conviction and its consequences. A plea rejection might simply mean that the defendant prefers to take his chances on an acquittal by the jury, rather than accept the certainty of punishment after a guilty plea. We need not decide whether a defendant is entitled to have admitted a rejected plea bargain. *Cf. United States v. Verdoorn*, 528 F.2d 103 (8th Cir.1976) (approving exclusion of a rejected plea bargain offered by a defendant to prove prosecutor's zeal, rather than defendant's innocent state of mind). The probative force of a rejected immunity offer is clearly strong enough to render it relevant. Fed.R.Evid. 401. As Dean Wigmore has written:

> Let the accused's whole conduct come in; and whether it tells for consciousness of guilt or for consciousness of innocence, let us take it for what it is worth, remembering that in either case it is open to varying explanations and is not to be emphasized. Let us not deprive an innocent person, falsely accused, of the inference which common sense draws from a consciousness of innocence and its natural manifestations.

2 *Wigmore on Evidence* § 293, at 232 (J. Chadbourn rev. ed. 1979).

[44] It is a closer question whether the District Judge exceeded her discretion under Fed.R.Evid. 403 to bar relevant evidence whose probative value is outweighed by the danger of unfair prejudice, confusion, or delay. On this point we note first that the District Judge appears to have excluded the evidence primarily, if not entirely, on the ground that the evidence was not relevant, that it contributed no probative force beyond the defendant's entry of a "not guilty" plea. But Rule 403 concerns may well have influenced the exclusion ruling; the Court at one point inquired whether a hearing would be necessary to determine if an immunity offer had been made, though Mariotta's basic claim concerning the offer was not disputed. Though we recognize the latitude of a district judge in making Rule 403 determinations, we conclude that in this case, the exclusion of Mariotta's state of mind evidence denied him a fair trial.

Mariotta's basic defense was that he was unaware of any criminal wrongdoing at Wedtech, that he was an innocent victim of the machinations of the sophisticated businessmen whom he had brought into the company to handle its financial affairs. That defense was seriously in issue as to most of the charges against him, drawing considerable support from the evidence. Mariotta was a tool and die worker, with a limited ability to read and write. He dropped out of a vocational high school

after one year. At Wedtech, he tended to the production side of the business; the cooperating witnesses who testified for the prosecution handled the business and financial side.

Though the Government presented abundant evidence that Wedtech officials paid bribes to numerous officials, there was a serious dispute as to whether Mariotta knew of the bribes. The principal evidence of his knowledge of the illegal activities was the testimony of the four cooperating witnesses whose accusations were subject to considerable doubt. Neuberger acknowledged that Moreno, Guariglia, and Shorten excluded Mariotta from numerous aspects of the company's affairs, despite his role as chairman. Guariglia testified that after he became president of Wedtech, he regarded Mariotta as a nuisance. Ultimately the cooperating witnesses forced Mariotta out of the company.

One episode casts serious doubt on whether the accusers truthfully testified that Mariotta knew of their illegal activities. Moreno acknowledged that during the public offering of Wedtech stock, the company had arranged to have some of the shares purchased and "parked" on the understanding that the "purchasers" would be paid for their services and for any losses. Wedtech provided one million dollars to a consulting firm to distribute the required payments. When an outside di-

rector of Wedtech, Paul Hallingby, conducted an investigation into this stock fraud scheme in 1986, after Mariotta had left the company, Moreno,. Neuberger, Guariglia, and Shorten all sought to frame Mariotta of securities fraud by telling Hallingby that Mariotta had arranged the one million dollar payment, although, as Moreno admitted at trial, Mariotta had nothing to do with the transaction. Moreno also admitted that Neuberger, Guariglia, and he had discussed having Mariotta murdered so that Wedtech could collect as beneficiary of a $15 million policy on Mariotta's life.

With the credibility of the accusations about Mariotta's knowledge of wrongdoing seriously challenged, evidence of his denial of such knowledge in response to an opportunity to obtain immunity by admitting it and implicating others became highly significant to a fair presentation of his defense. The unfairness of preventing his presentation of evidence of his consciousness of innocence was exacerbated when the Government presented evidence of his consciousness of guilt. This consisted primarily of the action of his wife, shortly after the cooperating witnesses pled guilty, in withdrawing $3.5 million from a joint account she and her husband maintained and using it to purchase gold bars and other investments in her own name.

Where evidence of a defendant's innocent state of mind, critical to a fair adjudication of criminal charges, is excluded, we

have not hesitated to order a new trial. *See United States v. Detrich*, 865 F.2d 17 (2d Cir.1988); *United States v. Kohan*, 806 F.2d 18 (2d Cir.1986); *United States v. Harris*, 733 F.2d 994 (2d Cir.1984); *United States v. DiMaria*, *supra*. Whether the error in excluding evidence of Mariotta's innocent state of mind warrants a new trial on all charges requires further consideration. He was convicted of RICO substantive and conspiracy offenses, two bribery offenses based on the five percent stock transfer and the $50,000 Loop Drive payment, two mail fraud offenses based on the false claim of majority stock ownership at the time of the original section 8(a) application and the subsequent section 8(a) submissions after the public offering and the sham stock purchase agreements, and four tax evasion offenses based on unreported receipt of funds from the FHJ account in 1981, 1982, 1984, and 1985. The issue in dispute as to some of these counts was whether Mariotta had knowledge of the unlawful activities of other Wedtech officials and of Biaggi. That issue was central to the Loop Drive bribery, which required a finding that Mariotta knew that the payment was demanded and made for Biaggi's political influence, rather than for legal work. It was also critical to the five percent stock bribery; though Mariotta unquestionably knew of the transfer, he did not necessarily know that issuance of the stock was a bribe. On the other hand,

Mariotta's knowledge of the wrongdoing of others had little if anything to do with his mail fraud and tax offenses. There was strong evidence that he and Neuberger were 50–50 partners when he falsely claimed to the SBA that he owned two-thirds of the company, and the evidence was also clear that he was not the bona fide owner of more than 51 per cent of the stock when the sham stock purchase agreements were arranged to support an appearance of majority ownership. His guilt on the tax offenses turned on the credibility of his claim, unsupported in the evidence, that his withdrawals from the FHJ account represented repayments of loans he had made to Neuberger.

[45] Thus, the erroneous exclusion of evidence supporting the inference that Mariotta was truthfully denying knowledge of the wrongdoing of others might well have affected the jury's verdicts on the bribery counts, but was not significant with respect to the mail fraud and tax counts. The effect of the exclusion on the RICO counts is problematic. In addition to the bribery offenses, the two mail fraud offenses were charged as RICO predicate acts and found to be such by the jury in its answers to interrogatories. *See United States v. Ruggiero*, 726 F.2d 913, 922–23 (2d Cir.1984); *id.* at 925–28 (Newman, J., concurring in part). Thus, we face no issue as to whether the jury found that Mariotta

participated in the conduct of the affairs of a RICO enterprise through a pattern that included at least two predicate acts. *See Brennan v. United States*, 867 F.2d 111, 114–16 (2d Cir.1989). Our question is whether, had the excluded evidence been admitted, the jury would have found that Mariotta not only committed the two mail fraud offenses but did so as part of a pattern of racketeering activity by which he participated in the conduct of the affairs of a RICO enterprise.

[46, 47] In some circumstances, the jury's findings of two predicate acts, lawfully constituting a RICO pattern, and of the other elements of a RICO offense, will permit affirmance of a RICO conviction notwithstanding the invalidation of other predicate acts. We decline to reach that conclusion here. The allegations of bribery and extortion dominated this prosecution. If a jury, informed of the evidence supporting Mariotta's claim that he lacked knowledge of the wrongdoing of others, found that the Government had not proved such knowledge beyond a reasonable doubt and for that reason acquitted him of the bribery offenses, we think it at least questionable whether such a jury would nonetheless have convicted him of the RICO offenses, notwithstanding his commission of the two mail fraud offenses. The excluded evidence might have sufficed to persuade a jury in general not to convict him of the RICO offenses, or, more technically, might

have provided a basis for declining to find that the two mail fraud offenses constituted a RICO pattern, even though they were legally sufficient. Under the circumstances, neither the bribery nor the RICO convictions may stand.

[48] Reversal of the bribery and RICO convictions does not require reconsideration of the sentences on the mail fraud and tax counts. Unlike the situation of Richard Biaggi and Neglia, where the vacated counts carried sentences equal to sentences on other counts, Mariotta's vacated counts carried sentences far more severe than the sentences on the remaining counts.[11] Under these circumstances, we can be confident that Judge Motley carefully scaled the sentences in relation to her assessment of the severity of the offenses, avoiding the risk that the sentences on the mail fraud and tax counts might have been selected partly to reflect the seriousness of the bribery and RICO convictions.

[49] C. *Biaggi's Claim Concerning His State of Mind.* Biaggi contends that the District Court erred in excluding evidence of his state of mind concerning his belief that the shares issued to Richard Biaggi were Richard's property and not merely held by him as nominee for his

11. Mariotta was sentenced on the RICO counts to eight-year terms, on the bribery counts to five-year terms, and on the mail fraud and tax counts to two-year terms, all terms to run concurrently.

father. Specifically, he sought to offer testimony of Richard's wife that on one occasion Richard offered to use part of the proceeds from sale of the shares to repay a loan to his father, and the father refused. On another occasion, Richard offered to transfer ten percent of the shares in his name to his father, an offer his father initially refused and then agreed to only on the condition that the accountants would assure him that such a transfer was lawful, a condition that was not fulfilled.

Whether or not Judge Motley was correct in her initial ruling that this testimony was inadmissible hearsay, we agree with the Government that Biaggi explicitly declined to press for admission of this testimony in the face of the Government's assertion that admission of evidence to support a claim that Biaggi thought the stock was his son's would permit introduction of similar act evidence in rebuttal to show prior occasions when Biaggi had used his children to mask his improper transactions. The matter was discussed with Judge Motley in extended colloquies, after which she stated her understanding that counsel for the Congressman and other defense counsel "are now willing to limit the offer to the state of mind of Richard Biaggi, is that right?" to which the Congressman's counsel replied, "That is correct, Your Honor." In accordance with that understanding, Richard's wife was then permitted to testify to conversations she had with Richard

that bore on Richard's state of mind concerning ownership of the stock, but did not testify further as to what the Congressman said or as to his presence at some of the conversations. Having elected, for understandable tactical reasons, not to press for admission of the evidence to show the Congressman's state of mind, Biaggi cannot complain on appeal about the consequences of his decision.

[50] To the extent that Richard complains of a limitation on admission of some of his wife's testimony offered to show *his* state of mind concerning stock ownership, the excluded evidence bore only tangential relevance to Richard's state of mind, and the limitations were not error in view of the testimony his wife presented concerning his conversations about the stock and his offer of payment to his father.

[51] D. *Biaggi's Claim Concerning "the Meese Defense."* Biaggi contends that the District Court's rulings denying certain document requests and trial subpoenas precluded him from presenting what was referred to as "the Meese defense." Specifically, Biaggi sought to subpoena senior Executive Branch officials including Edwin Meese, who was then Attorney General of the United States and had been White House Chief of Staff at the time Wedtech was awarded its major government contracts, and to obtain documents showing the involvement of Meese

and other officials in obtaining government contracts for Wedtech. Biaggi wanted to show that since Wedtech already had the aid of the Republican White House, aid obtained by payment of large "lobbying" fees of questionable legality, the company had no need to bribe a Democratic congressman.

In view of the considerable extent to which "the Meese defense" became known to the jury, Judge Motley acted well within her discretion in rejecting requests for documents and testimony that would have greatly expanded the scope of an already wide-ranging trial. From the four cooperating witnesses, the defense established the considerable role played by Meese in assisting Wedtech in its dealings with the Executive Branch and the substantial payments made to Meese's advisor, lawyer/lobbyist E. Robert Wallach, who received $800,000 and one percent of Wedtech's stock for exercising his influence with Meese. The testimony included an allegation that Wallach had agreed, for payments of $100,000 each from Moreno and Guariglia, to use his influence with Meese to "fix" their cases and guarantee that their sentences would not include jail terms.

The prosecution made no attempt to dispute the allegations of Meese's involvement on behalf of Wedtech or the unlawfulness of that involvement. The prosecu-

tion's response in summation was that Wedtech "bribed a whole ream of people ... everyone including these people [the defendants]." The prosecution argued that Wedtech had unlawfully sought to influence both the Executive and the Legislative Branches: "[W]hatever they did with Meese was wrong, but that was done separately in the Executive Branch." The prosecution's position was clearly stated, "[O]ur office referred the allegations regarding Mr. Meese to Washington because the law doesn't permit us to prosecute our own boss." The prosecutor added, in a memorable phrase, "Meese was a sleaze."

. . . . . .

V. Jury Charge

A. *Simon's Extortion Offenses.* In explanation of the "inducement" element of extortion, Judge Motley charged the jury as follows:

> [I]f the defendant repeatedly accepted money or benefits from representatives of Wedtech, and if the amount of money or benefits accepted could reasonably have affected the defendant's exercise of his duties, then you may find defendant induced the payment of money.

Simon specifically objected to this portion of the charge, contending that it permitted the jury to infer inducement from receipt

of entirely lawful campaign contributions.[12] The Government contends that this portion of the charge was expressly approved by a majority of this Court in *United States v. O'Grady*, 742 F.2d 682 (2d Cir.1984) (in banc). The Government's reliance on *O'Grady* is a classic example of the danger of enlisting language from an appellate opinion to serve in situations beyond the point at issue that occasioned the language.

The defendant in *O'Grady* was an official of the New York City Transit Authority. His duties included selecting vendors and assuring contract compliance. The evidence established that over a nine-year period he had accepted $30,000 worth of various forms of entertainment from Transit Authority vendors. This Court, in banc, held that it was error to charge that "the mere acceptance of benefits by a public official is extortion under color of official right if the official knew that his office was the motivation behind the giving of the benefits." *Id.* at 687. However, eight members of the Court expressed the view that, upon retrial, the jury should be instructed that it could infer inducement upon a finding of "*repeated* acceptances over a period of time of *substantial* benefits (i.e., benefits of a nature and magni-

12. A similar charge was given with respect to the offense of bribery:

> [Y]ou may infer guilt from evidence of benefits received and subsequent favorable treatment....

tude which reasonably could affect a public official's exercise of his or her duties)," *id.* at 694 (Pierce, J., concurring) (emphasis added); *id.* at 694–95 (Newman, J., concurring).

[52–55] The *O'Grady* standard, permitting an inference of inducement from repeated acceptance of substantial benefits, makes sense as applied to an appointed official who has no lawful basis for receiving cash or other benefits from those conducting business with his agency. It does not apply, however, to an elected official who may lawfully receive campaign contributions. Permitting an inference of inducement from an elected official's repeated acceptance of substantial benefits would subject every recipient of campaign contributions to conviction for extortion. When an elected official who has received campaign contributions is charged with extortion and with receiving bribes, the charge must carefully focus the jury's attention on the difference between lawful political contributions and unlawful extortionate payments and bribes. If the Government's claim concerns payments that neither the donor nor the public official contends are campaign contributions, the distinction can be easily explained. However, if the Government contends that money paid to an official as a campaign contribution was extorted or paid as a bribe, the distinction requires considerable explanation. It will not be sufficient, as

the Government suggested at oral argument, simply to tell the jury that whether a payment is a lawful campaign contribution or an unlawful extortion or bribe is a matter to be resolved based on all the evidence in the case. We need not attempt to identify all the pertinent factors that might bear on the issue, but we can suggest that they include whether the contribution was reported, whether it was unusually large compared to the contributor's normal donations, whether the official threatened adverse action if the contribution was not made, and how directly the official or those soliciting for him linked the contribution to specific official action to be taken by the official.

[56] There is a line between money contributed lawfully because of a candidate's positions on issues and money contributed unlawfully as part of an arrangement to secure or reward official action, though its location is not always clear. *See United States v. Brewster*, 506 F.2d 62, 78–83 (D.C.Cir.1974); *see generally* J.T. Noonan, Jr., *Bribes* 621–51 (1984). The laws governing extortion and bribery may sometimes be too blunt to be used as instruments to police that line, though cases may be imagined where egregious facts, submitted to a jury under careful instructions, would permit a conviction for bribery based on campaign contributions. Fortunately,

this case does not require precise delineation of that line, nor, under the circumstances, does the inapplicable charge language from *O'Grady* warrant reversal of Simon's conviction for extortion.

There was no issue put to the jury in Simon's case as to whether any payment was a lawful political contribution or an unlawful extortion or bribe. Neither the Government nor Simon contended that the Lawrence kickbacks or the job for Bittman were campaign contributions. As to the $50,000 demanded at the Yonkers Raceway, it was the Government's contention that this was a campaign contribution that Simon had extorted, but Simon defended, not on the ground that the money was a lawful contribution, but on the ground that the demand was never made and the money was never received or paid on his behalf. He denied any demand for money at the Yonkers Raceway, either in June 1984, when the Government initially alleged that he was present with Neuberger, or in November 1984, when, according to the plausible evidence in the case, he was present with Neuberger. He testified that at a January 1985 condolence call at Simon's home, Neuberger volunteered that Wedtech officials would contribute $50,000 to his campaign and that in fact $10,000 was contributed by Neuberger and $5,000 by Moreno.

The jury was never asked to decide whether this $15,000 of campaign contribu-

tions was unlawful. These contributions did not appear on the Government's list of items, based on Ceil Lewis's testimony, showing the disbursement of funds from the FHJ account to political organizations, synagogues, and restaurants, allegedly at Simon's direction. Included on the list was $10,000 in cash that Lewis testified she handed in a sealed envelope to Lawrence for delivery to Simon, a delivery Lawrence testified he made. The Government alleged that, all told, nearly $50,000 was taken from the FHJ account for Simon's purposes. Simon claimed he never demanded the $50,000 nor directed its disbursement. He specifically denied receiving $10,000 in cash in an envelope from Lawrence. The jury resolved these factual issues against him by convicting him on Count 19, which charged extortion of $50,000 in cash, contributions, and expenses.

Moreover, the jury charge on extortion included language requiring a finding that the defendant acted "unlawfully" and specifically defined extortion under color of right as the "misuse" of public office to secure payment of money. In light of the factual issues framed by the parties' contentions, these passages of the jury charge provide adequate assurance that Simon suffered no prejudice by the erroneous inclusion of the "pattern of benefits" language from *O'Grady*.

B. *Simon's Tax Offense.* Count 23 charged Simon was income tax evasion for the year 1985 by failing to pay taxes on three categories of income—the $50,000 of benefits demanded at the Yonkers Raceway, the Lawrence kickbacks, and the $9,000 worth of tile and labor furnished by Fogliano. Simon alleges error with respect to the charge concerning the Fogliano payment, specifically, the failure to charge, as requested, that if Simon intended to pay for the work done and the materials supplied by Fogliano, there is no income to report. In instructing the jury as to receipts that do not constitute reportable income, Judge Motley included "a purchase of services given on credit." The Government contends that Simon failed to object to the omission of his requested language and that the charge adequately covered Simon's point.

[57, 58] At the conclusion of the charge, Simon objected generally to the Court's failure to include requested instructions, but did not complain of the precise wording of the charge on reportable income. Generally, the proffer of a requested instruction does not excuse a defendant from the need to object specifically to its omission from the charge in order to preserve the issue for appeal. *See United States v. Friedman*, 854 F.2d at 554–56. A general complaint of failure to give requested instructions might suffice to preserve a claim

concerning a request fully considered and denied by the trial court at a charge conference and wholly omitted from the charge, but where the topic is covered in the charge, a complaint that the charge language incorrectly or inadequately covers the topic must be specifically called to the Court's attention after the charge is given. Counsel is obliged to state "distinctly" the grounds of his objection. Fed.R.Crim.P. 30.

[59] In this case, the Court charged on the topic of reportable income, but erred in failing to instruct on the defense contention. It was not Simon's point that Fogliano had extended credit, giving Simon a period of time in which to pay an incurred liability; the claim, supported by the evidence, was that Fogliano had not completed the work nor sent a bill and that Simon had no obligation to pay until the work was completed and billed. But this is precisely the type of distinction that requires a specific objection to the wording of a charge.

In the circumstances of this case, the omission of the requested charge was not plain error. As demonstrated by their conviction of Simon on the substantive counts of extortion concerning the $50,000 in benefits and the Lawrence kickbacks, the jurors clearly found that he had received reportable income in 1985. Even if a correct instruction governing the Fogliano payment had been given, there is no reasonable pos-

sibility that the verdict on the tax count would have been different.

[60] C. *Ehrlich's Defense to the Five Percent Stock Interest.* Ehrlich contends that the District Court mischaracterized his defense to receipt of half the five percent stock interest. His counsel argued in summation, and several witnesses testified, that the five percent interest was given to Ehrlich and Richard Biaggi in appreciation of the forbearance of Biaggi & Ehrlich to bill for all legal services rendered or to press for payment of bills rendered in the early days before Wedtech became successful—for "stay[ing] with us in the hard times," as one witness put it. Judge Motley characterized the defense contention to be that the stock was issued in payment for past legal services. Ehrlich contends this obscured the defense to the extent that it was based on receipt of stock for loyalty in general, rather than as compensation for particular services rendered. Though it would have been preferable to characterize the defense as counsel wished it put, *see United States v. Pedroza*, 750 F.2d 187, 205 (2d Cir.1984), *cert. denied*, 479 U.S. 842, 107 S.Ct. 151, 93 L.Ed.2d 92 (1986), Judge Motley's formulation did not affect the substantial rights of any defendant. Ehrlich's lawyer himself told the jury, at one point, that the stock had been given "in payment for past legal services rendered." The "loyalty" rationale was not so distinct from the motivation of paying for past

services that it had to be separately mentioned by the District Judge.

## CONCLUSION

Each of the six appellants was fairly convicted on at least two counts. We have considered all of the many additional issues raised on this appeal and conclude that none warrants any relief beyond what we have ordered in this opinion.

With respect to Richard Biaggi, his convictions on Counts 4, 5, and 6 are reversed, and these counts are dismissed; the sentences imposed on Counts 16 and 17 are vacated, and these counts are remanded for resentencing. With respect to Peter Neglia, his conviction on Count 1 is reversed, and this count is dismissed; the sentences imposed on Counts 28 and 30 are vacated, and these counts are remanded for resentencing. With respect to John Mariotta, his convictions on Counts 1, 2, 42, 43, and 44 are reversed, and these counts are remanded for retrial.[13] In all other respects, the convictions and sentences of these defendants and of Mario Biaggi, Bernard Ehrlich, and Stanley Simon are affirmed.

13. Count numbers in this paragraph are those used in the judgments of conviction, not those in the redacted indictment submitted to the jury on which the jury verdicts were based.

APPENDIX B

UNITED STATES COURT OF APPEALS

For The

SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of July, one thousand nine hundred and ninety.

PRESENT: HON. WILFRED FEINBERG,

HON. JON O. NEWMAN, C.JJ

HON. JACOB MISHLER, D.J.

Circuit Judges,

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UNITED STATES OF AMERICA,

Appellee,

v

MARIO BIAGGI, et al.,

Defendants,

STANLEY SIMON, MARIO BIAGGI, RICHARD BIAGGI, PETER NEGLIA, JOHN MARIOTTA, BERNARD EHRLICH,

Defendants-Appellants.

Docket No. 88-1530

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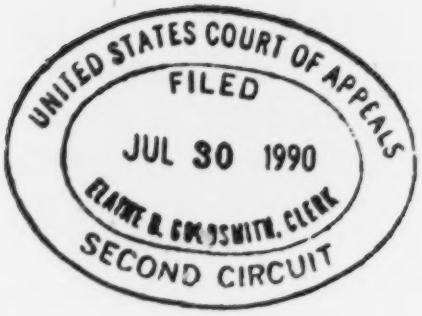
A petition for a rehearing having been filed herein by counsel for the defendant-appellant Stanley Simon,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith
Clerk

by Tina Eve Brier
Chief Deputy Clerk



APPENDIX C

**UNITED STATES of America,**

**v.**

**Mario BIAGGI, Stanley Simon, Peter Neglia, John Mariotta, Bernard Ehrlich, Richard Biaggi, and Ronald Betso, Defendants.**

**No. 87 Cr. 265 (CBM).**

United States District Court,
S.D. New York.

Oct. 23, 1987.

Defendant, charged with violations of the Racketeering Influenced and Corrupt Organizations Act and with other crimes in 50–count indictment, moved to sever his trial from that of his codefendants and to sever counts charging him with extorting salary kickbacks and tax evasion from remaining charges. The District Court, Motley, J., held that: (1) Government sufficiently alleged defendant's general knowledge of enterprise to warrant joinder; (2) Government could allege multiple conspiracies as predicate acts of RICO charges; (3) defendant did not provide basis for severing defendant to avoid prejudice in form of possibility of unfair trial; and (4) counts charging defendant with extorting salary

kickbacks and tax evasion did not have to be severed.

Motions denied.

**1. Indictment and Information ⇐124(1)**

Government sufficiently alleged defendant's general awareness of existence of RICO enterprise, so as to justify joining defendant in RICO indictment with codefendants, where, under facts as alleged by Government, defendant was necessarily aware of existence of corporation, which met RICO definition of enterprise, and aware, to extent of his own alleged participation in its affairs, that it was corrupt enterprise. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.; 18 U.S.C.A. §§ 1961(1)(A), (4, 5), 1962(c).

**2. Indictment and Information ⇐124(1)**

Government's failure to plead awareness of existence of RICO enterprise, assuming such failure existed, was insufficient to establish misjoinder of defendant in RICO indictment, even if such failure vitiated RICO counts; so long as remaining counts alleged that defendant participated in same series of acts or transactions as did coracketeers, joinder would be proper, even if defendant had not been named in RICO counts at all. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.; 18 U.S.C.A. § 1962(c).

**3. Indictment and Information ⇐124(1)**

Charges against defendant were sufficiently related to alleged activities of other defendants to constitute part of same series of acts or transactions, so that defendant could be joined in RICO indictment with other codefendants. Fed.Rules Cr. Proc.Rule 8(b), 18 U.S.C.A.; 18 U.S.C.A. § 1962(c).

**4. Indictment and Information ⇐125(5½)**

Government could allege multiple conspiracies as predicate acts of racketeering activity supporting RICO conspiracy; such allegations would not amount to misjoinder of multiple conspiracies under cover of single alleged conspiracy. 18 U.S.C.A. § 1962(c).

**5. Criminal Law ⇐622.2(3)**

Defendant's claim that he would be forced, absent severance, to participate in joint trial far longer than solo trial would have been did not provide basis for relief from joinder on grounds of prejudice, even assuming defendant would be unable to practice his profession during trial and thereby, perhaps, be reduced to penury; such joinder was appropriate only to mitigate possibility of unfair trial. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

**6. Criminal Law ⇐622.2(3)**

Defendant's claim that he would be prejudiced by joinder because codefendants

were accused of extracting more than $5 million out of corporation, whereas he was accused of extorting no more than few hundred thousand dollars, did not provide basis for severance to provide relief from prejudice. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

**7. Criminal Law ⇐622.2(1)**

Fact that defendant would be forced to stand trial with sitting congressman was insufficient to justify severance in RICO prosecution, despite resulting publicity; defendant could scarcely claim that solo trial would be devoid of publicity, inasmuch as he stood indicted for acts he allegedly committed while one of most powerful and best-known politicians in New York City. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.; 18 U.S.C.A. § 1962(c).

**8. Criminal Law ⇐622.2(8)**

Claim that Government would introduce substantial amount of evidence that was unrelated to defendant did not justify severance, in RICO conspiracy prosecution, absent presentation of any reason to suppose that district court was incapable of giving sufficiently curative instructions, or that jury would be unable to follow them. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.; 18 U.S.C.A. § 1962(c).

**9. Indictment and Information ⇐129(4)**

Counts charging only one defendant with extorting salary kickbacks and tax

evasion could be joined with remainder of indictment, in which defendant and other defendants were charged in varying combinations with, inter alia, RICO conspiracy charges, pursuant to rule requiring that offenses joined be of same or similar character or based on same act or connected transactions. Fed.Rules Cr.Proc.Rule 8(a), 18 U.S.C.A.; 18 U.S.C.A. § 1962(c).

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Rudolph W. Giuliani, U.S. Atty., New York City by Mary T. Shannon, for U.S. of America.

Kramer, Levin, Nessen, Kamin & Frankel by Maurice N. Nessen, New York City, for defendant Stanley Simon.

MOTLEY, District Judge.

OPINION

Defendants in this case are charged, by a Second Superseding Indictment ("Indictment") in fifty counts filed on August 5, 1987, with violations of the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (1982), involving nineteen predicate acts. Count One charges the RICO violations. Count Two charges the defendants with RICO conspiracy. Twenty-seven of the remaining counts charge substantive offenses based on the predicate acts; fifteen charge income tax evasion; the remainder charge

filing of false financial disclosure statements, perjury, and extortion.

Defendant Stanley Simon, Bronx Borough President until his resignation on March 11, 1987, moves in the alternative (a) to require the Government to submit an offer of proof under Fed.R.Crim.P. 12(b) explaining why he is charged with RICO violations; (b) to sever his trial from that of his codefendants, either as a matter of law under Fed.R.Crim.P. 8, or as an exercise of this Court's sound discretion under Fed.R.Crim.P. 14; (c) to sever Counts Twenty-One and Twenty-Three of the Second Superseding Indictment.[1] By a scheduling order dated July 27, 1987, the Court took this motion on submission, at Simon's request. For the reasons set forth below, we deny the motion in its entirety.

FACTS

For the purposes of this motion, only a partial and abbreviated account of the al-

1. Defendant John Mariotta joins this motion, saying: "We agree with Simon that Mariotta would be extremely prejudiced by a joint trial with Simon where Simon is tried on counts which have nothing to do with Mariotta or Wedtech." Affidavit of Jeffrey Glekel 2 n. *. Of course, Simon is not concerned with prejudice to Mariotta as a result of his being tried with Simon. The Court takes this reference to potential prejudice to mean that Mariotta joins Simon's motion only insofar as Simon moves for relief from prejudicial joinder under Fed.R. Crim.P. 14, and takes up this question in its proper place.

leged facts in this complex case is necessary.[2]

The mysterious behavior and ultimate suicide of Queens Borough President Donald Manes in early 1986 called attention to ongoing federal and local investigations into the conduct of New York City public officials, some of which led to the prosecution and conviction of major political figures.[3] Stanley Simon first came under investigation in February 1986 in connection with alleged overcharges for printing expenses incurred during his 1985 campaign. N.Y. Times, Feb. 6, 1986, reproduced as Exhibit F to Affidavit of Maurice Nessen.[4] No indictments resulted from this inquiry. The present case grows out of a joint investigation by the United States Attorney for the Southern District of New York, Rudolph W. Giuliani, and the District Attor-

2. A more complete statement of the facts will appear in this Court's opinion on defendants' omnibus pretrial motions.

3. *See, e.g., United States v. Friedman*, 635 F.Supp. 782 (S.D.N.Y.1986) (decision on pretrial motions in prosecution of corruption in New York City Parking Violations Bureau, involving Bronx Democratic Party chairman Stanley Friedman).

4. The Department of Justice's Public Corruption Unit first received allegations of misconduct by Simon in January 1986. Affidavit of Mary T. Shannon in Support of Government's Response to Defendants' Omnibus Motions ("Shannon Response Aff.") ¶ 20.

ney for the Bronx, Mario Merola, that focused on the Wedtech Corporation.[5] Wedtech, founded in 1965 by defendant Mariotta as the Welbilt Electronic Die Corporation, had grown from a small tool-and-die manufacturing concern to a successful publicly traded defense contractor, primarily on the strength of contracts awarded it under the Small Business Administration's Section 8(a) program, which provides set-aside contracts for minority-owned businesses. Mariotta was praised by President Reagan as one of the "conscientious and hard working individuals" who are responsible for "real progress in this country." Lathem, Prez Hails Jobs "Hero," N.Y. Post, Mar. 7, 1984, reproduced as Exhibit B of Affidavit of Maurice Nessen. In December 1986, however, Wedtech declared bankruptcy; in January 1987, four Wedtech officials under grand jury scrutiny—Fred Neuberger, chairman of the board; Anthony Guariglia, the president; Mario Moreno, vice chairman; and Alfred Rivera, a director—resigned.[6] Thompson, Wedtech Go Ahead, N.Y. Daily News, Jan. 14, 1987,

5. Wedtech was first investigated by the Department of Defense Criminal Investigative Service in June 1985. Shannon Response Aff. ¶ 18. The United States Attorney's investigation began in March 1986. *Id.* ¶ 22. The joint investigation arose in July 1986. *Id.* ¶ 24.

6. Neuberger, Moreno, Guariglia, and Lawrence Shorten, a financial consultant who held a variety of positions for Wedtech, were named as unindicted coracketeers. Indictment ¶¶ 12–15.

reproduced as Exhibit E of Affidavit of Maurice Nessen. In February the four admitted diverting millions of dollars in Wedtech funds to their personal use and bribing local, state, and federal officials. Thompson, Wedtech Four Admit Thefts and Bribes, N.Y. Daily News, Feb. 5, 1987, reproduced as Exhibit E of Affidavit of Maurice Nessen. One of the city officials the Wedtech Four implicated was Borough President Simon. Amid rumors of his imminent indictment, Mr. Simon resigned on March 11, 1987.

Simon's indictment came down on April 1, 1987. Its six counts charged Simon with (1) extorting a job and salary increases for his brother-in-law, Henry Bittman, from Wedtech; (2) extorting some $50,000 from Wedtech; (3) extorting some $14,000 in kickbacks from an employee in his office, later identified as one Ralph Lawrence; (4) falsely answering questions put to him by a grand jury in February, 1986, about whether he had ever received, been offered, or solicited things of value in connection with his official duties; (5) obstructing justice by offering this false testimony to the grand jury; (6) evading federal income taxes by failing to report some $23,000 in income for 1985. The indictment against Simon was depicted in the press as the first in a series that would encompass other prominent New York politicians. *See, e.g.*, Barbanel, Simon, Ex-Bronx Leader, Indict-

ed for Extortion and Pay Kickbacks, N.Y. Times, Apr. 2, 1987, reproduced as Exhibit N of Affidavit of Maurice Nessen.

The promised Superseding Indictment, naming all the present defendants, came down on June 3, 1987. This second Indictment brought the same charges against Simon, but embedded them in a RICO scheme.[7] This second Indictment contained fifty-eight counts but had to be replaced by a third, the present Indictment in fifty counts, to conform to the Supreme Court's decision in *McNally v. United States*, — U.S. —, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). It is this third and current Indictment that Simon attacks.

DISCUSSION

I. *Simon's Arguments*

Simon's motion for an offer of proof is meant as a preliminary to further motions to sever, as well as motions to dismiss. Simon Notice of Motion 1. This Court finds that the Government has already provided sufficient information to deny Simon's present motions to sever. There-

7. Five of the six counts were pleaded separately in the Superseding Indictment as Counts Nineteen through Twenty-Three. The obstruction of justice count was pleaded only as one of the RICO predicate acts, Racketeering Act Sixteen. The two counts of extortion from Wedtech were also pleaded as predicate acts, Racketeering Acts Three and Four.

fore, the motion to require the Government to provide an offer of proof is denied.[8]

8. Simon's claim that the District Courts of the Second Circuit exhibit a trend toward requiring pretrial offers of proof from the Government in RICO cases deserves brief discussion. Simon cites five cases in which he claims such offers of proof have been required: *United States v. Badalamenti*, 663 F.Supp. 1542 (S.D.N.Y.1987) (Leval, J.); *United States v. Gallo*, 654 F.Supp. 463 (E.D.N.Y.1987) (Weinstein, J.); *United States v. Friedman*, 635 F.Supp. 782 (S.D.N.Y.1986) (Knapp, J.); *United States v. Persico*, 646 F.Supp. 752 (S.D.N.Y.1986) (Brieant, J.); *United States v. Castellano*, 610 F.Supp. 1359 (S.D.N.Y. 1985) (Sofaer, J.). As far as this Court can discern, in *Badalamenti*, *Gallo*, and *Persico*, the district judges ordered the Government to provide further information on their own motion, not on a motion from the defense; in *Friedman*, the Government made the offer of proof voluntarily.

It should be noted that the exchange cited from Judge Brieant's pretrial conference in *Persico*, in which the Government contended that the court had to accept the allegations of the indictment as true, and Judge Brieant responded that this was not so, inasmuch as severance rests on considerations of fairness, can only have been directed to a Rule 14 motion to sever, not a Rule 8 motion. For purposes of a Rule 8 motion, the court must indeed accept the allegations of the indictment; *see, e.g., United States v. Kabbaby*, 672 F.2d 857, 860 (11th Cir.1982); *United States v. Sutherland*, 656 F.2d 1181, 1190 n. 6 (5th Cir.1981). Considerations of fairness, i.e. prejudice, are relevant only to a discretionary severance under Rule 14. Thus, Simon's citation of *Persico* in this context is disingenuous.

As his Reply Memorandum evinces, Simon's principal support for his motion is Judge So-

(Footnote continued on following page)

This opinion proceeds to consider Simon's motions for severance.

Simon first argues that severance is required as a matter of law under Fed.R.

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(Footnote continued.)

faer's discussion in *Castellano*. In that case, Judge Sofaer observed that several defendants' motions to require the Government to show that it had a prima facie case were in effect motions to dismiss, which could normally not be raised until the conclusion of the Government's case. 610 F.Supp. at 1397. Judge Sofaer went on to distinguish such motions from "pretrial scrutiny of the government's theory, and of the evidence it represents it expects to be able to introduce at a joint trial." *Id.* Judge Sofaer did not, however, then go on to require the Government to tender an offer of proof; instead, he evaluated the Government's theory directly. Thus, Simon cites no authority for the proposition that a *defendant* can move to require the Government to tender an offer of proof. *See* note 14 *infra* (noting that burden of proof of prosecutorial bad faith, including prosecution on discredited theory of joinder, is on defendant); *cf. United States v. Santoro*, 647 F.Supp. 153, 182 (E.D.N.Y. 1986) (in response to argument that substantive counts of indictment, charging crimes committed as part of pattern of racketeering activity, should be severed from RICO count, court observed that "That connection must of course be proven at trial. But the government need not do so at this stage simply to satisfy the defendants that the joinder is proper.").

disposition of Count Two, Counts Nineteen Crim.P. 8(b). He presents what he calls a "syllogism" in support of this claim:[9]

> (1) if Count 1 cannot be sustained because Mr. Simon did not knowingly participate in an enterprise that included the corruption of others and
>
> (2) if Count 2 cannot be sustained because he did not know of any of the other alleged schemes (thereby making it "duplicitous" by virtue of its pleading a single conspiracy where multiple conspiracies really existed), then
>
> (3) the surviving counts charging various bad acts by other defendants cannot be joined with counts involving Mr. Simon, for they would not arise under the same "series of acts or transactions" and therefore do not satisfy the requirements of Fed.Cr.R. 8(b).

Memorandum of Law in Support of Defendant Stanley Simon's Pre–Trial Motions for a Pre–Trial Statement from the Government and for Severances ("Simon Memo of Law") 12. Simon then suggests that this

9. Of course, what Simon offers is not a syllogism. It is not even an argument, let alone a valid argument. It is a material conditional with a conjunctive antecedent, having the form "If A and B, then C." There is a hypothetical syllogism of which this conditional is the conclusion, namely "If ((if A then C) and (if B then C)) then (if A and B then C)." This syllogism expresses a valid argument; however, it expresses a sound argument only if the premises, "If A then C" and "If B then C," are true. And this is what is at issue.

Court employ a "stepped procedure" to evaluate the indictment. Simon does not clearly explain what he means by such a procedure. Logic dictates, however, that we proceed in a manner that may reflect Simon's suggestion.

First, then, this Court will assess Counts One and Two in terms of substantive RICO law. In an invitation we have rejected, Simon apparently would have this Court require the Government to tender an offer of proof and a statement of its theories, following remarks of Judge Sofaer in *United States v. Castellano*, 610 F.Supp. 1359, 1397 (S.D.N.Y.1985). He predicts that following such a tender this court will or should hold that Count One does not charge him with a RICO offense because it does not allege that he knowingly participated in a racketeering enterprise. In that case, the argument apparently continues, this Court would have to dismiss Count One. With the disappearance of Count One, there would be no enterprise the defendants carried out in common. In consequence, instead of charging defendants with a single RICO conspiracy, Count Two would be "duplicitous" because it charges multiple conspiracies in a single count. The claim is that Simon did not knowingly participate with his alleged coracketeers in a unified conspiracy (a wheel with a rim as well as a hub and spokes). If so, Simon's argument continues, whatever the correct through Twenty-Three—the counts that derive from the original indictment against

him—are misjoined as a matter of law, under Fed.R.Crim.P. 8(b), with the rest of the indictment, because they are not part of the "same series of acts or transactions," as Rule 8(b) requires. The consequence would be that Simon's trial must be severed.[10]

10. The above is the clearest argument this Court can extract from Simon's presentation, which jumps back and forth between discussion of Rule 8(b), substantive RICO law, and duplicity.

For example, Simon seems confused about exactly how he would have this Court evaluate Counts 1 and 2. The quotation from his "syllogism" suggests that they fail to state a substantive RICO charge against him, but he also seems to suggest that he is improperly *joined* in Counts 1 and 2. *See* Simon Memo of Law 15–16 ("Unless there be proof that Mr. Simon joined the RICO enterprise knowing that its scope went beyond himself ... the RICO count would fail as a substantive count and, at the same time, would not satisfy the joinder requirement of involving the same series of transactions under Fed.Cr.R. 8(b)."). This is, at best, too compressed. If Count 1 had to be dismissed, Simon's argument would have to be that the underlying *predicate acts* charged against him, expressed as independent counts, are misjoined with the predicate acts, expressed as independent counts, charged against the other defendants, because there is no enterprise remaining to tie them together.

Similarly, in discussing Count 2 Simon seems to confuse duplicity, which is the charging of two or more distinct crimes against a *single* defendant in violation of Fed.R.Crim.P. 8(a), *see* 8 J. Moore, *Moore's Federal Practice* ¶ 8.03[1] (1987), with misjoinder, the joinder of two or more insufficiently related defendants in violation of Fed.R.Crim.P. 8(b).

II. *Analysis of Count One*

[1] Rule 8(b) provides that "[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or the same series of acts or transactions constituting an offense or offenses." As is well known, the strictures of Rule 8(b) are loosened when a conspiracy, especially a RICO conspiracy, is alleged:

> The limitations on the government's charging power imposed by [Rule 8(b)] are largely eliminated when a conspiracy is alleged. The mere allegation of a conspiracy presumptively satisfies Rule 8(b), since the allegation implies that the defendants must have engaged in the same series of acts or transactions constituting an offense. The presence of a substantive RICO count under 18 U.S.C. § 1962(c), and of a RICO conspiracy count under 18 U.S.C. § 1962(d), further broadens the government's power to charge multiple defendants together. A RICO charge under § 1962(c) necessarily incorporates allegations that each of the defendants named was associated with or employed by the same enterprise, and participated in the enterprise by engaging in at least two acts of racketeering related to the enterprise. In short, by loosening the statutory requirements for what constitutes joint criminal activity,

Congress limited the force of Rule 8(b) in such situations.

*Castellano,* 610 F.Supp. at 1396.

Simon recognizes that the well-settled principles lucidly stated by Judge Sofaer pose a nearly insuperable obstacle to his claim that he is misjoined in this Indictment under Rule 8(b): "[W]e start with what this Court has recognized and face up to it: ordinarily, the charge of a conspiracy to commit RICO and the allegations that defendants "knowingly" agreed are sufficient to overcome a contention that there should be a severance because of misjoinder." Simon Memo of Law at 19. Nonetheless, Simon relies on *Castellano* for the proposition, on which he ultimately stakes his entire motion, that a RICO defendant such as he is improperly joined unless the indictment alleges that he knows that the enterprise's "scope went beyond himself and generally where the indictment says it went." [11]

11. Simon Memo of Law 15. Simon submitted his papers to this Court before Chief Judge Weinstein of the Eastern District of New York filed his most recent opinion in *United States v. Gallo,* 668 F.Supp. 736 (E.D.N.Y.1987). Faced with an argument identical to Simon's, complete with wheels, hubs, spokes, rims, and chains, Judge Weinstein went even further than Judge Sofaer, seemingly holding that *as a matter of law* a RICO indictment meets Rule 8(b)'s joinder requirements:

> If we were to apply pre-RICO concepts of conspiracy to this case, we would likely find that a single overarching conspiracy could not

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Simon says that there are three exceptions to the general principle that joinder of defendants in a RICO indictment is almost

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(Footnote continued.)

be charged based on these allegations. The traditional theoretical concepts of conspiracy, particularly as evolved in the "wheel" and "chain" concepts, do not adapt well to the vast, elaborate, and diversified operations of the sort found in organized crime families and narcotics networks. As Judge Friendly noted, when applied to the long-term operation of an illegal business, "the common pictorial distinction between 'chain' and 'spoke' conspiracies can obscure as much as it clarifies." ...

With the enactment of RICO, Congress supplemented traditional "chain" and "wheel" theories with a new conspiratorial concept—the enterprise.... This new notion furnishes prosecutors a much broader scope of authority for joining defendants who are alleged to have participated in a common grouping or association.... The "gravamen" of this kind of conspiracy is the agreement on the "overall" objective, namely, to participate in the affairs of the enterprise.... Joinder under Rule 8(b), therefore, is automatically authorized simply through the RICO conspiracy charge, which supplies the "sufficient nexus" to tie the various defendants and the diverse predicate offenses together.... The limitations on the prosecution's power to charge are virtually eviscerated by the RICO conspiracy device.

*Gallo*, at 747 (citations omitted). Although this Court fully agrees with Judge Weinstein's analysis, which is sufficient to dispose of Simon's Rule 8 motion, it is important to show how Simon's extreme reliance on *Castellano* is misplaced.

automatically proper.[12] The first, which he declines to invoke, is prosecutorial bad faith. The third, which he claims that the District Courts of the Second Circuit have fashioned especially for RICO cases, is requiring the Government to make an offer of proof.[13] The second, on which Simon's

12. Actually, Simon splits one of these exceptions into two, and ignores another. *United States v. Sutherland*, 656 F.2d 1181, 1191 (5th Cir.1981), noted exceptions "where the prosecution is shown to have acted in bad faith" and "where the government's indictment under a single count was from the outset based on an improper interpretation of the law." If the second *Sutherland* exception refers to the substantive criminal law, Simon does not invoke it. *Castellano* noted a bad faith exception, explaining that in the Second Circuit "the government acts in good faith unless it knowingly relies on a theory of joinder which has previously been held insufficient, or acts without 'a reasonable expectation that sufficient proof will be forthcoming at trial.'" 610 F.Supp. at 1397 (citation omitted). The first *Castellano* factor is Simon's second factor; the second is, perhaps, straightforward bad faith, possibly the first Simon factor.

13. There is obvious confusion here. The alleged tendency toward requiring an offer of proof from the Government is not a principle of criminal procedure that determines whether joinder is proper; it is a device to elicit information to enable a court to apply the principles of criminal procedure relating to joinder. If a court finds that the Government has joined defendants in bad faith or according to a mistaken theory of joinder, Rule 8(b) requires the remedy of severance. If a court requires the Govern-

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motion stands or falls, is prosecution on a theory of joinder known to be insufficient. *Castellano*, 610 F.Supp. at 1397.

Simon's argument is that the Government is prosecuting on the mistaken theory that individuals can be joined in a RICO indictment without knowing "what the others [in the racketeering enterprise] were doing in some overall way...." [14] Simon relies on *Castellano* for this claim as well, citing Judge Sofaer's holding that "RICO itself expressly requires that any defendant prosecuted under section 1962(c) must be shown to have been aware of at least the general existence of the enterprise named in the indictment." *Id.* at 1401.

(Footnote continued.)

ment to make an offer of proof, it will impose a severance only if the proof reveals a violation of Rule 8(b), or prejudice sufficient to endanger a fair trial, justifying a discretionary severance under Rule 14. If there is no violation or prejudice, there should be no severance.

Thus, Simon's third "exception" is no exception at all to the federal courts' policy of permitting liberal joinder in conspiracy and RICO cases.

14. Simon Memo of Law 17. This Court assumes that Simon means "*knowingly* prosecuting," as is required for a showing of bad faith in the Second Circuit. *See Castellano*, 610 F.Supp. at 1397 (citing cases). The burden of proof of bad faith in this sense, incidentally, is on the defendant, making Simon's demand that the Government prove its good faith by making an offer of proof that much less compelling. *See, e.g., United States v. Luna*, 585 F.2d 1, 4 (1st Cir.), *cert. denied*, 439 U.S. 852, 99 S.Ct. 160, 58 L.Ed.2d 157 (1978).

Judge Sofaer continued, in a passage quoted by Simon at length:

> Section 1962(c) expressly applies only to persons "employed by" or "associated with" an enterprise involved in interstate or foreign commerce. These phrases can only be given content in association-in-fact cases by a requirement that the government show, at a minimum, that the defendant was aware of the existence of a group of persons, organized into a structure of some sort, and engaged in ongoing activities, which the government can prove falls within the definition of enterprise contained in section 1961(4). In addition, section 1962(c) requires proof that the defendant "conduct[ed]" or "participate[d], directly or indirectly, in the conduct of the enterprise's affairs...." This choice of words also reflects a view of the defendant as aware of the existence of the named enterprise, since it requires a particular kind of connection between the defendant's behavior and the enterprise's affairs.

*Id.*

Simon asserts that this passage imposes a requirement that "there be proof that Mr. Simon joined the RICO enterprise knowing that its scope went beyond himself and generally where the indictment says it went," Simon Memo of Law 15, that he must have "known what the others were doing in some overall way (if not in detail)," *id.* 17, or that he "must have known

that others were also agreeing to violate RICO," *id.* 18. These vague phrases are useless in determining what, on Simon's view, he had to know to be properly indictable on the RICO counts, and the remainder of Simon's Memo of Law offers no better guidance. The Nessen Affidavit, however, does mark out "[*a*]*t least* six distinct schemes involving the other defendants [that] spring out of Count 1 of the Second Superseding Indictment and its sixteen alleged acts of racketeering." *Id.* ¶ 26. It is fair to infer that Simon is claiming that the Government must allege that he knew about at least one of these other "subconspiracies." [15] The Government, by

15. Simon's continual references to *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), and its celebrated image of a conspiracy as a wheel that requires a rim to bind its spokes together indicate that he regards the "subconspiracies" as spokes and knowledge of the "subconspiracies" as the rim. Such casual reliance on *Kotteakos* is misplaced. As Judge Keenan observed in *United States v. Persico*, 621 F.Supp. 842 (S.D.N.Y.1985), "*Kotteakos* arose under the general conspiracy statute, 18 U.S.C. § 371, while this case is brought under RICO. A RICO conspiracy is substantially broader than an ordinary § 371 conspiracy." *Id.* at 856.

Moreover, Simon cannot, as he admits, be claiming that he has to be shown to have known about all the details of the RICO scheme. This is not even a requirement in non-RICO conspiracy cases. *See Blumenthal v. United States*, 332 U.S. 539, 556–57, 68 S.Ct. 248, 256–257, 92 L.Ed.

(Footnote continued on following page)

contrast, argues that it need only show that Simon was aware of the corrupt enterprise itself, Wedtech, not necessarily of anybody else's participation in that enterprise through a pattern of racketeering activity. Government's Memorandum of Law in Opposition to the Defendant Simon's Motion for Severance ("Government Memo in Opposition") 10.

The statute that defines a substantive RICO offense, 18 U.S.C. § 1962(c), provides as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

From the statute, the authors of a prominent treatise on federal jury instructions drew the following list of elements of a § 1962(c) offense:

1. That an enterprise existed;

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(Footnote continued.)

154 (1947) (knowledge of "essential nature of the plan" sufficient); *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir.1978) ("a party to a conspiracy need not know the identity, or even the number, of his confederates") (quoting *United States v. Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944).

2. That the enterprise affected interstate or foreign commerce;
3. That the defendant was associated with or employed by the enterprise;
4. That the defendant conducted or participated in the affairs of the enterprise; and
5. That this conduct or participation by the defendant was through a pattern of racketeering activity.

L. Sand, J. Siffert, W. Loughlin & S. Reiss, *Modern Federal Jury Instructions* § 52.04 at 52–35 (1984). *See* Government Memo in Opposition 10 (quoting instructions); *Castellano*, 610 F.Supp. at 1398 (same). Judge Sofaer's holding regarding these instructions in *Castellano*, on which Simon puts so much weight, was that the very meaning of such terms as "associate with," "conduct," and "participate in" implies an awareness of "at least the general existence of the enterprise," *id.* at 1401. In so holding Judge Sofaer rejected the Government's view in *Castellano* that it had to prove only the existence of the enterprise and the commission by the defendant of two acts of racketeering, constituting a pattern.

In the present case, there is no dispute that the enterprise is Wedtech, which, as a corporation, falls explicitly under the definition of "enterprise" in 18 U.S.C.

§ 1961(4).[16] It is not disputed that Wedtech had an effect on interstate commerce. Simon cannot dispute that all the Government need prove is that he was aware of the existence of Wedtech. The only questions are whether the predicate acts—Simon's allegedly extorting a job for his brother-in-law and his alleged extortion of $50,000 in cash and favors from Wedtech—constitute control of or participation in Wedtech's affairs through a pattern of racketeering activity; whether Simon was associated with or employed by Wedtech; and whether, as a matter of substantive RICO law, Simon had to know about others' Wedtech-related corrupt activities for his actions to constitute predicate acts.

First, it is clear that Simon's predicate acts meet the definition of "pattern of racketeering activity" at 18 U.S.C. § 1961(5). Both were racketeering activities under 18 U.S.C. § 1961(1)(A) (acts involving extortion), and both were committed within ten years of each other and after the effective date of RICO.

16. The Government seems to regard the fact that Wedtech is a corporation as sufficient to dispose of Simon's use of *Castellano*. It tries to distinguish *Castellano* by noting that that case involved an association in fact, not a corporation. Because Simon was not an officer, director, or stockholder of Wedtech, however, the question still arises how he conducted or participated in its activities, and the answer will come in terms of an association in fact between Simon and the corporation. Thus, this attempt to distinguish *Castellano* is too facile.

Second, Simon's activities would seem to constitute participation in the affairs of Wedtech through this pattern of racketeering activity—even to rise to the level of conduct of those activities:

> We think that one conducts the activities of an enterprise through a pattern of racketeering when (1) one is enabled to commit the predicate offenses solely by virtue of his position in or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise. Simply committing predicate acts which are unrelated to the enterprise or one's position within it would be insufficient.

*United States v. Scotto*, 641 F.2d 47, 54 (2d Cir.1980). Here, Simon's alleged procurement of a job for Bittman was certainly related to the activities of Wedtech. Moreover, that action, as well as the alleged extortion of the $50,000 would have been impossible if Simon, by virtue of his position as Bronx Borough President, had not had control over the affairs of Wedtech.

Third, although Simon was, of course, not employed by Wedtech, his satisfaction of the "participation in or conduct of" requirement virtually automatically satisfies the "associated with" requirement. *See Alfaro v. E.F. Hutton Co.*, 606 F.Supp. 1100, 1116 (E.D.Pa.1985).

Thus, the Government has alleged against Simon all of the elements necessary for a substantive RICO offense. Necessarily, Simon was aware of the existence of Wedtech, and aware, to the extent of his own alleged participation in its affairs, that it was a corrupt enterprise. No more is needed to satisfy Judge Sofaer's "awareness" requirement. Judge Sofaer was concerned, in the lengthy passages quoted from *Castellano*, to refute the Government's contention that all it had to do to prove a RICO violation was to prove a pattern of racketeering activity: according to the Government in *Castellano*, this was itself sufficient to establish association and conduct or participation. Judge Sofaer's concern is highlighted by the rather farfetched counterexamples to the Government's position that he presents in *Castellano*.[17] For Judge Sofaer, the commission of predicate acts that are only coincidentally or adventitiously connected with an enterprise is not enough to sustain a RICO indictment. Moreover, if one does not know about the existence of an enterprise, one's actions cannot be connected with it more than coincidentally. Thus, the "par-

17. 610 F.Supp. at 1400 (under Government construction of RICO, hypothetical gang of bank officers engaged in laundering money would legitimate RICO indictment of cashier, ignorant of scheme, who handled bank transactions for officers; same result if cashier, with no knowledge of officers' enterprise, embezzles from bank, independently of officers, twice).

ticipation" and "association" requirements entail a general awareness of the existence of the enterprise, as Judge Sofaer concluded.

This, however, by no means entails that if the enterprise encompasses a number of other activities indictable under RICO one has to be aware of these activities to be aware of the enterprise. Only if one *identified* the enterprise with these "subconspiracies" would one imagine that Simon could be indicted for RICO violations only if he knew about some or all of the others. But there is no reason to do so. The enterprise at issue here is Wedtech, a corporation whose affairs were conducted, according to the Government, through a pattern of racketeering activity. Thus, the requirement Simon extracts from *Castellano* is satisfied here.

[2] It is important to notice, moreover, that even if Simon's interpretation of *Castellano* were accurate, that would not establish that he is entitled to a severance. Failure to plead awareness of the existence of the enterprise, even if it vitiates a § 1962(c) count, is not enough to establish misjoinder under Rule 8(b). *Cf. Castellano*, 610 F.Supp. at 1396–97:

> Indeed, even if a defendant is not named in a conspiracy or RICO count, he may be charged in a separate count, in the same indictment, if he is alleged to have participated in the same series of acts or

> transactions that constituted the conspiracy or RICO offense, despite the fact that his participation may have been too limited to permit his being named as a co-conspirator or co-racketeer.

This suggests that even if Simon should convince this Court that Counts One and Two are improperly pleaded as to him, that would not by itself be a reason to sever Counts Nineteen through Twenty-Three. So long as those counts alleged that he participated in the same series of acts or transactions as did the coracketeers, Rule 8(b) would be satisfied, even if Simon had not been named in Counts One and Two at all. Our Court of Appeals has confirmed that "[v]irtually by definition," a RICO count "constitute[s] a 'series of acts or transactions' sufficiently intertwined to permit a joint trial of all defendants," *United States v. Bagaric*, 706 F.2d 42, 69 (2d Cir.), *cert. denied*, 464 U.S. 840, 104 S.Ct. 133, 78 L.Ed.2d 128 (1983), and that "a construction of Rule 8(b) that required a closer relationship between transactions than that necessary to establish a 'pattern of racketeering activity' under RICO might possibly prohibit joinder in circumstances where Congress clearly envisioned a single trial," *United States v. Weisman*, 624 F.2d 1118, 1129 (2d Cir.1980).

[3] Thus, Simon's "syllogism" fails as a matter of logic. This Court finds, moreover, that it fails as a matter of fact as

well: the charges against Simon are clearly closely related enough to the alleged activities of the other defendants to constitute part of the "same series of acts or transactions."

III. *Analysis of Count Two*

[4] Simon's contention that Count Two is duplicitous because it charges multiple conspiracies is easily dealt with. First, this issue is not suitable for pretrial disposition. As the court observed in *United States v. Persico*, 621 F.Supp. 842 (S.D.N.Y.1985):

> [T]he Second Circuit has repeatedly made clear that whether there is a single or multiple conspiracies is a "question of fact for a properly instructed jury," ... and is "singularly well-suited to resolution by the jury." ... If the government fails to establish the existence of the single conspiracy charged in the indictment, defendants may raise the issue at the close of the government's case or request a jury instruction on multiple conspiracies.

*Id.* at 857 (citations omitted). *See United States v. Orozco-Prada*, 732 F.2d 1076 (2d Cir.), *cert. denied*, 469 U.S. 845, 105 S.Ct. 154, 83 L.Ed.2d 92 (1984).

Simon contends, of course, that the Government actually is alleging multiple conspiracies that are misjoined, under cover of a single alleged conspiracy. This claim is refuted by our Court of Appeals's

holding in *United States v. Ruggiero*, 726 F.2d 913 (2d Cir.1984):

> Nor does a RICO conspiracy under 18 U.S.C. § 1962(d), supported by predicate acts of racketeering activity that in themselves are conspiracies, violate the principle of *Kotteakos v. United States* .... A RICO conspiracy under § 1962(d) based on separate conspiracies as predicate offenses is not merely a "conspiracy to conspire" as alleged by appellants, but is an overall conspiracy to violate a substantive provision of RICO, in this case § 1962(c), which makes it unlawful for any person associated with an interstate enterprise to "participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."

*Id.* at 923. Inasmuch as Part II of this opinion has sustained the Government's contention that Count One of the Indictment properly pleads the existence of a § 1962(c) racketeering enterprise, *Ruggiero* parallels the present case exactly. The most Simon's attack on Count Two can establish is that the various predicate acts are actually conspiracies to commit the predicate crimes. As in *Ruggiero*, the only conclusion to draw is that we are dealing with subconspiracies of an overall conspiracy to violate § 1962(c): "*Ruggiero* demonstrates that a RICO conspiracy is broader than a conspiracy to commit a particular

crime." *Persico*, 621 F.Supp. at 841. Thus, the second prong of Simon's attack on the Indictment fails.

IV. *Alleged Prejudice Resulting from Joinder*

[5–8] Simon claims that even if, as this Court has held, he is not entitled to a severance as a matter of law under Fed.R. Crim.P. 8, this Court should grant a severance as a matter of discretion under Fed.R. Crim.P. 14, to avoid the prejudice that would result to Simon in a joint trial. There is a strong presumption in favor of joint trials of defendants jointly indicted, especially "[w]here, as here, the crime charged involves a common scheme or plan," *United States v. Girard*, 601 F.2d 69, 72 (2d Cir.), *cert. denied*, 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96 (1979). Therefore, the defendant has the burden of demonstrating "prejudice so substantial as to deny him a fair trial," *United States v. Cody*, 722 F.2d 1052, 1061 (2d Cir.1983), *cert. denied*, 467 U.S. 1226, 104 S.Ct. 2678, 81 L.Ed.2d 873 (1984); *United States v. Haim*, 218 F.Supp. 922, 931 (S.D.N.Y.1963), and that burden is a "heavy" one, *United States v. Sotomayor*, 592 F.2d 1219, 1227 (2d Cir.), *cert. denied*, 442 U.S. 919, 99 S.Ct. 2842, 61 L.Ed.2d 286 (1979); *see United States v. Werner*, 620 F.2d 922, 928 (2d Cir.1980). Although Simon claims that "the prejudice of a joint trial to Mr. Simon is palpable. You can almost slice it," Si-

mon Memo of Law 25, most of Simon's allegations of prejudice fall entirely outside the scope of Rule 14. The prejudice Rule 14 seeks to mitigate is the possibility of an *unfair trial*. As Judge Weinfeld put it in a frequently quoted passage,

> The ultimate question on a motion for severance is: [W]hether, under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements, and conduct. In sum, can the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him? If so, though the task be difficult, severance should not be granted.

*United States v. Kahaner*, 203 F.Supp. 78, 81–82 (S.D.N.Y.1962) (Weinfeld, J.), *aff'd*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836, 84 S.Ct. 73, 11 L.Ed.2d 65 (1963). Thus, the fact that Simon will be forced, absent severance, to participate in a joint trial longer, even far longer, than a solo trial would have been is simply not a reason for severance under Rule 14—even if, as Simon alleges, he will be unable to practice his profession during the trial and thereby, perhaps, be reduced to penury. Only allegations that go to the fairness or unfairness of a joint trial are relevant to a

Rule 14 motion.[18] Thus, Simon's allegation that he will be prejudiced because his codefendants are accused of extracting more than $5 million out of Wedtech, whereas he is accused of extorting no more than a few hundred thousand dollars, does go to Rule 14. Unfortunately, it is not a sufficient ground for severance. "[I]t is well established that 'simply because the evidence against codefendants is stronger or that one defendant's role in the crime is lesser than that of others is not sufficient reason to grant a severance.'" *United States v. Feola*, 651 F.Supp. 1068, 1124 (S.D.N.Y. 1987) (quoting *United States v. Potamitis*, 564 F.Supp. 1484, 1486 (S.D.N.Y.1983), *aff'd*, 739 F.2d 784 (2d Cir.), *cert. denied*, 469 U.S. 918, 105 S.Ct. 297, 83 L.Ed.2d 232 (1984)). Similarly, the claim that "Mr. Simon will be on trial with a sitting Congressman and the drama that goes with that," Simon Memo of Law 26, conceivably states a reason why Simon would be prejudiced by a joint trial—Congressman Biag-

18. This Court does not disagree with Judge Weinstein, who in *United States v. Gallo* weighed many of the factors Simon cites and determined that they called for multiple severances. *Gallo*, at 749–758. In extraordinary cases such as *Gallo*, such factors may engender prejudice justifying a severance under Rule 14. This Court only holds that they do not do so in this case.

19. It is incidentally noteworthy that Mariotta does not move on his own to be severed from *Congressman Biaggi*.

gi's national stature may result in more intense media coverage of the trial than there would otherwise be, subjecting Simon to the blinding glare of reflected publicity. Such publicity, of course, would only be prejudicial if it is unfavorable to Simon, and this Court can scarcely be expected to predict the character that any media coverage of this case will have. Moreover, Simon can scarcely claim that a solo trial would be devoid of publicity, inasmuch as he stands indicted for acts he allegedly committed while one of the most powerful and best-known politicians in New York City. Indeed, this Court can see no other reason why John Mariotta would join Simon's motion for severance, claiming, as noted herein, that *he* would be prejudiced by a joint trial with *Simon*.[19] Finally, Simon claims that "The government has shown us a room-full of documents that it will pour out over Mr. Simon, the vast bulk of which has nothing to do with him." *Id.* If indeed most of the Government's evidence has nothing to do with Simon, it is the province of this Court to issue cautionary instructions to the jury to prevent it from misapprehending the relevance of those documents. Simon presents no reason whatsoever to suppose that this Court is incapable of giving sufficiently curative instructions, or that the jury, which Simon will after all have a hand in selecting, will be unable to follow them. Relying on the established principle that "a general, un-

supported claim of prejudice, as asserted by these defendants, is insufficient to warrant the severance of counts that are properly joined," *United States v. Haim*, 218 F.Supp. 922, 932 (S.D.N.Y.1963), this court declines to sever Simon's trial under Rule 14.[20]

V. *Severance of Counts Twenty-One and Twenty-Three*

[9] Finally, Simon maintains that Count Twenty-One, which charges him with extorting salary kickbacks from Ralph Lawrence, and Count Twenty-Three, which charges him with tax evasion, should be severed because they are unrelated to Wedtech and so cannot satisfy Rule 8(b)'s requirement that they arise from the "same series of acts or transactions" as the balance of the indictment.

Simon is mistaken as to the applicable law. He maintains that "when any defendant in a multiple defendant case challenges joinder of offenses, his motion is made under Fed.Cr.R. 8(b) rather than 8(a)." Simon Memo of Law at 28. However, the case Simon paraphrases here, *United States v. Papadakis*, 510 F.2d 287, 300 (2d Cir.), *cert. denied*, 421 U.S. 950, 95 S.Ct.

20. Of course, exactly the same considerations apply to Mariotta's application to join Simon's motion. Indeed, Mariotta has presented no grounds at all to believe that he will be prejudiced by a joint trial with Simon. The motion to sever is, accordingly, denied as to Mariotta as well.

1682, 44 L.Ed.2d 104 (1975), involved a defendant who alleged misjoinder of a conspiracy count in which he was not named with substantive counts in which he was named along with other defendants. Simon, unlike Papadakis, here attacks joinder of two counts, in which he alone is charged, to the remainder of the indictment, in which he and the other defendants are charged in varying combinations. In this situation, it is clear that Rule 8(a) applies. *United States v. Isaacs*, 493 F.2d 1124, 1158 (7th Cir.) (per curiam) ("When multiple defendants are charged in the same as well as multiple counts, a challenge by a single defendant to joinder of offenses in which he is charged is governed by Rule 8(a)."), *cert. denied*, 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146 (1974); *United States v. Clemente*, 494 F.Supp. 1310, 1315 (S.D.N.Y.1980) ("When a defendant in a multiple defendant case named in one count seeks to sever other counts in which he alone is charged, Rule 8(a) controls."). *See United States v. Feola*, 651 F.Supp. 1068, 1120 (S.D.N.Y.1987) (providing Rule 8(a) analysis of motion for severance of weapons counts, in which only one defendant was named, from drug counts in which that defendant was named with others).

Rule 8(a) requires only that the offenses joined against one defendant be "of the same or similar character or ... based on

the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." In response to an Order of this Court dated September 9, 1987, the Government submitted an affidavit explaining its view of the relation between Count Twenty–One, Simon's alleged extortion of Ralph Lawrence, and the rest of the indictment. The Government will contend that "Lawrence ... acted as Simon's courier for the receipt of illegal Wedtech payments" and that "Lawrence acted as Simon's co-conspirator in that regard." Affidavit of Mary T. Shannon ¶ 8, at 7. The Government also claims, as Count Twenty–One charges, that "Lawrence himself was extorted by Simon." *Id.* Unquestionably, these are alleged crimes of "the same or similar character" as those with which Simon is charged in Counts Nineteen and Twenty, extortion of kickbacks from Wedtech in the form of a job for his brother-in-law and of cash and other favors. In consequence, Count Twenty-One is properly joined under Rule 8(a).[21]

21. We need not address Simon's or the Government's contentions about the admissibility of Lawrence's testimony as probative of Simon's state of mind. It would seem that both the Government and Simon mistakenly presuppose that joinder of Count 21 is to be evaluated under Rule 8(b) rather than Rule 8(a).

Similarly, the Government argues that Count Twenty-Three is properly joined in the indictment, citing *United States v. McGrath*, 558 F.2d 1102, 1106 (2d Cir.1977), *cert. denied*, 434 U.S. 1064, 98 S.Ct. 1239, 55 L.Ed.2d 765 (1978), for the proposition that joinder of tax evasion counts that deal with a single year is proper under Rule 8(a). Simon's reply is that his motion for severance of Count Twenty-Three, or at least that portion that relates to tax evasion on income allegedly acquired from Fogliano, is governed by Rule 8(b). Because, as has been explained, Simon is mistaken in this contention, and because he presents no other reason why this Court should not follow *McGrath*, we hold that Count Twenty-Three is properly joined under Rule 8(a).

## CONCLUSION

In summary, this Court denies Simon's motion to require the Government to make an offer of proof, noting that he has, and has not met, the burden of showing why the Court should look beyond the face of the Indictment; we deny his motion to sever his trial under Rule 8, holding that the Government has sufficiently pleaded his knowing participation in a RICO enterprise; we deny his motion for discretionary severance under Rule 14, holding that however much he may be inconvenienced by a joint

trial, he has not raised the possibility that a joint trial will be unfair to him, as Rule 14 requires; and we deny his motion to sever Counts Twenty-One and Twenty-Three, holding that they are properly joined under the applicable rule, Rule 8(a).

APPENDIX D

**UNITED STATES of America**

**v.**

**Mario BIAGGI, Stanley Simon, Peter Neglia, John Mariotta, Bernard Ehrlich, Richard Biaggi, and Ronald Betso, Defendants.**

**No. 87 Cr. 265 (CBM).**

United States District Court,
S.D. New York.

Aug. 4, 1988.

Defendant charged with extortion, tax evasion and RICO violations filed motion for mistrial, claiming counts were improperly joined. The District Court, Motley, J., held that: (1) tax evasion counts were properly joined with RICO count, and (2) even if rule concerning joinder of defendants, rather than rule concerning joinder of offenses, applied to defendant's motion to sever extortion count, which was charged only against him, from RICO counts, which was charged against defendant and codefendants, extortion and RICO counts were sufficiently related to be joined.

Motion denied.

**1. Indictment and Information ⇐124(1), 130**

In Second Circuit, joinder of multiple offenses against multiple defendants named in same counts is to be evaluated under rule concerning joinder of defendants rather than rule concerning joinder of offenses. Fed.Rules Cr.Proc.Rule 8(a, b), 18 U.S.C.A.

**2. Indictment and Information ⇐130**

Tax evasion counts were properly joined with RICO count based on defendant's alleged illegal receipt of benefits from charged enterprise, and extortion counts based on defendant's alleged receipt of kickbacks from his former employer, where tax evasion counts were either based on defendant's failure to report the benefits and kickbacks on his tax return, or arose from defendant's failure to report other income in same tax year in which he failed to report kickbacks and benefits. Fed.Rules Cr.Proc.Rule 8(a, b), 18 U.S.C.A.

**3. Indictment and Information ⇐124(1), 130**

Rule concerning joinder of offenses, rather than rule regarding joinder of defendants, applied in determining whether extortion count, which was charged only against defendant, was properly joined with RICO counts, which were charged against defendant and codefendants. Fed.

Rules Cr.Proc.Rule 8(a, b), 18 U.S.C.A.; 18 U.S.C.A. §§ 1961–1968.

**4. Indictment and Information ⇐124(5)**

Even if rule concerning joinder of defendants, rather than rule concerning joinder of offenses, applied to defendant's motion to sever extortion count, which was charged only against him, from RICO counts, which was charged against defendant and codefendants, extortion and RICO counts were sufficiently related to be joined; extortion count arose from defendant's alleged receipt of kickbacks from employee, and RICO counts were based on defendant's use of employee as courier to receive alleged extortion payments from charged enterprise. 18 U.S.C.A. §§ 1961–1968; Fed.Rules Cr.Proc.Rule 8(a, b), 18 U.S.C.A.

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Rudolph W. Giuliani, U.S. Atty., New York City by Edward J.M. Little, Mary T. Shannon, Howard Wilson, S. Alexander Planzos, Sp. Asst. U.S. Atty., for U.S.

LaRossa, Mitchell & Ross, New York City by James M. LaRossa, for defendant Mario Biaggi.

Kramer, Levin, Nessen, Kamin & Frankel, New York City by Maurice N. Nessen, David Seide, Cecelia Loving-Sloane, for defendant Stanley Simon.

Kevin P. McGovern, Brooklyn, N.Y., for defendant Peter Neglia.

Skadden, Arps, Slate, Meagher & Flom, New York City by Jeffrey Glekel, David H. Hennessy, for defendant John Mariotta.

Kostelanetz, Ritholz, Tigue & Fink, New York City by Peter J. Driscoll, Catherine L. Redlich, for defendant Bernard Ehrlich.

Dominick F. Amorosa, New York City, for defendant Richard Biaggi.

Buchwald & Kaufman, New York City by Alan R. Kaufman, for defendant Ronald Betso.

## OPINION

MOTLEY, District Judge.

On July 20, 1988, before summations began in this case, defendant Stanley Simon moved for a mistrial in light of the recent decision by a panel of the Court of Appeals for the Second Circuit in *United States v. Turoff*, 853 F.2d 1037 (2d Cir.1988). Trial Transcript at 18415–18. That motion was denied, *id.* at 18602, for the reasons set forth below.

### I. *Background*

The Government's factual allegations and the evidence brought out at trial of this multidefendant case have been set out in

three opinions, familiarity with which is assumed: *United States v. Biaggi*, 672 F.Supp. 112 (S.D.N.Y.1987); *United States v. Biaggi*, 675 F.Supp. 790 (S.D.N.Y.1987); and *United States v. Biaggi*, 705 F.Supp. 790 (S.D.N.Y.1988).

In the first of these opinions, this court denied defendant Simon's pretrial motions for severance. These included motions to sever Counts Twenty–One and Twenty–Three from the indictment. Count Twenty–One charged Simon with extorting one Ralph Lawrence, Simon's self-styled right-hand man, by giving him salary increases and forcing him to kick a portion of those increases back. Count Twenty–Three charged Simon with income tax evasion for the calendar year 1985. Simon's argument for severance was that these charges were not related to the other charges against him in the indictment, all of which involved his alleged participation in the affairs of the Wedtech Corporation through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (1982 & Supp. IV 1987). Therefore, the argument continued, these counts could not meet the requirement of Fed.R.Crim.P. 8(b) that the offenses charged arise from

"the same series of acts or transactions," and so must be severed.[1]

This court held that Simon was in error to argue that Rule 8(b) applied to his case, and that joinder was proper because Counts Twenty-One and Twenty-Three met the more liberal "offenses of the same or similar character" standard of Rule 8(a), which did apply.[2] The ground of Simon's motion for a mistrial is that *Turoff* shows that this court was mistaken; that Rule 8(b) rather than Rule 8(a) applies.

Having considered *Turoff*, this court concludes that this recent opinion provides no ground to reevaluate the denial of Simon's severance motions. In this court's view, *Turoff* does no more than restate the settled law of the Second Circuit on joinder under Rule 8, albeit in a broad enough

1. Fed.R.Crim.P. 8(b) provides, in relevant part:
"Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

2. Fed.R.Crim.P. 8(a) provides:
Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged ... are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

fashion to permit a misconstruction according to which Rule 8(b) rather than Rule 8(a) applies to Simon's case. Of equal importance, not only is this court persuaded that Rule 8(a) remains the appropriate provision to apply to Counts Twenty–One and Twenty–Three; even if Rule 8(b) were to apply instead, those counts would still be properly joined in this indictment.

II. *The Decision in Turoff*

*Turoff* involved the complicated activities of Jay Turoff, formerly chairman of the New York City Taxi and Limousine Commission. In bare outline and relevant part, Turoff and his coappellants appealed their convictions on Counts One and Thirteen of the indictment against them—conspiracy to commit mail fraud and conspiracy to commit tax fraud, respectively. Among other things, they argued that those conspiracy counts were misjoined. In affirming the judgments of conviction, the Second Circuit panel took the opportunity "to clarify the rules applicable to the joinder of multiple charges and multiple defendants in a single indictment," at 1042. The panel pointed out the familiar facts that Rule 8(a) governs joinder of offenses, whereas Rule 8(b) governs joinder of defendants, and that Rule 8(a) imposes the generally less stringent requirement on joinder that the joined offenses be "of the same or similar character." *Id.* at 1042. The panel went on to observe, correctly, that "Rule 8 does not

explicitly provide a standard that governs when multiple offenses *and* multiple defendants are joined in one indictment." *Id.* at 1043. It then pointed out that "One logical approach would invoke Rule 8(a) when defendants seek severance of *offenses*, which is the case here, and Rule 8(b) when defendants seek severance of *defendants*, which is not this case." *Id.*

The logical approach, however, is not the one the Second Circuit has adopted, at least according to the panel:

> We have permitted multiple defendants facing multiple charges to move for either type of severance, but we invoke only Rule 8(b) to test the validity of joinder regardless of which type of severance is sought. As the district court recognized, our cases indicate that "when a defendant in a multiple-defendant case challenges joinder of offenses, his motion is made under 8(b) rather than 8(a)." ... The effect of construing Rule 8 in this fashion is that multiple defendants cannot be tried together on two or more "similar" but unrelated acts or transactions; multiple defendants may be tried together only if the charged acts are part of a "series of acts or transactions constituting an offense or offenses."

*Id.* (quoting *United States v. Papadakis*, 510 F.2d 287, 300 (2d Cir.), *cert. denied*, 421 U.S. 950, 95 S.Ct. 1682, 44 L.Ed.2d 104

(1975)). After reciting policy reasons in favor of this approach, the panel held: "Thus, multiple defendants may be charged with and tried for multiple offenses only if the offenses are related pursuant to the test set forth in Rule 8(b), that is, only if the charged acts are part of a 'series of acts or transactions constituting ... offenses.'" *Id.* at 1043.

The phrase "multiple defendants ... charged with multiple offenses" is, however, ambiguous. It can refer to a situation in which defendants D and E, for instance, are jointly charged with offenses O and P, but D alone is charged with another offense Q. Substitute "Stanley Simon" for "D," and "Counts Twenty–One and Twenty–Three" for "Q," and we get *United States v. Biaggi.* Thus, it seems appropriate to call this situation a *Simon-style joinder.* But the phrase can also refer, perhaps more naturally, to a situation in which each of the multiple defendants are charged with the multiple offenses: in which both D and E are charged with both O and P. Because these were indeed the facts in *Turoff,* it seems appropriate to call this situation a *Turoff-style joinder.*

This ambiguity means that the holding quoted from *Turoff* admits of at least two interpretations. On a sweeping interpretation, *Turoff* would apply beyond its facts to Simon-style joinders. The result would be that Rule 8(a) *never* applies to joinder of

offenses in a multiple-defendant case. On this view, so soon as the second defendant E is joined to the original defendant D, Rule 8(a) drops out and Rule 8(b) fills the void it leaves—even if the question is joinder of the offense Q against D alone, a question that clearly would have been decided under Rule 8(a) before E was joined. We may call this sweeping interpretation the thesis of the primacy of Rule 8(b) over Rule 8(a), or the "primacy thesis." Simon's argument requires that the primacy thesis be correct.[3]

[1] Limited to its facts, *Turoff* stands for the proposition that Turoff-style joinders—joinder of multiple offenses against multiple defendants *named in the same counts*—are to be evaluated under Rule

3. Whether correct or not, the primacy thesis or something like it is frequently expressed. *See, e.g., United States v. Eagleston,* 417 F.2d 11, 14 (10th Cir.1969); *Williamson v. United States,* 310 F.2d 192, 197 n. 16 (9th Cir.1962); *United States v. Roselli,* 432 F.2d 879, 899 (9th Cir. 1970), *cert. denied,* 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971); *United States v. Ostrer,* 460 F.Supp. 1388, 1390 (S.D.N.Y.1978); *United States v. Mandel,* 415 F.Supp. 1033, 1045 (D.Md. 1976); 1 C. Wright, *Federal Practice & Procedure: Criminal* § 144 at 494 ("It is firmly established in the case law that the propriety of joinder in cases where there are multiple defendants must be tested by Rule 8(b) alone and that Rule 8(a) has no application."); *id.* n. 1 (collecting cases). In this opinion this court finds, and need find, only that the primacy thesis is not, even in *Turoff,* the unequivocal view of the Second Circuit.

8(b) rather than 8(a). Only this narrower reading, in this court's view, is consistent with the decided cases of the Second Circuit. For the Second Circuit clearly recognizes that Simon-style joinders, at least when the party in Simon's position is the movant for severance, are governed by Rule 8(a), and thus are an exception to the primacy thesis. This means, however, that *Turoff* is irrelevant to the present case.

III. *Count Twenty-Three*

[2] It will be simplest to begin by examining the relevance, if any, of *Turoff* to Count Twenty-Three, the tax evasion count. The income for 1985 Simon is alleged to have failed to report has three components: (1) benefits from Wedtech; (2) kickbacks from Ralph Lawrence; (3) benefits from one Sabino Fogliano, a contractor and friend of Simon's who is alleged, among other things, to have done some $9,000 worth of uncompensated tile work on Simon's house. This court's original opinion on Simon's severance motion endorsed the Government's citation of a Second Circuit case that applied Rule 8(a) to the joinder of tax evasion counts with nontax counts—*United States v. McGrath*, 558 F.2d 1102, 1106 (2d Cir.1977), *cert. denied*, 434 U.S. 1064, 98 S.Ct. 1239, 55 L.Ed.2d 765 (1978). 672 F.Supp. at 125. Simon's reply to the Government's argument was that at least the income allegedly derived from Fogliano was unrelated

enough to the Wedtech charges against him that it should be governed by Rule 8(b). This reply purely and simply missed the point of the Government's citation of *McGrath* and this court's endorsement thereof. *Turoff* provides an occasion to clarify these points.

In *McGrath*, it was clearly appropriate to apply Rule 8(a), and there was no reason to apply a Rule 8(b) analysis, because there was only one defendant. *McGrath* held that it was proper under Rule 8(a) to join tax evasion counts with extortion counts, in a context in which the alleged extortion generated the income McGrath allegedly failed to report. The case *McGrath* cited for this proposition, however, *United States v. Roselli*, 432 F.2d 879 (9th Cir. 1970), *cert. denied*, 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971), *was* a Rule 8(b) case involving multiple defendants. *Roselli* took Rule 8(b) to imply that "so long as all defendants participate in a series of acts constituting an offense or offenses, the offenses and defendants may be joined even though not all defendants participated in every act constituting each joined offense." 432 F.2d at 899. It concluded that joinder of tax counts with nontax counts was permitted under Rule 8(b) because "the joint activity from which the unreported income was received constituted an offense or offenses in itself." *Id.* at 900.

The teaching of *Roselli*, then, is that tax counts and nontax counts are properly joined under Rule 8(b) when the nontax counts charge illegal activity that generated the income that the tax counts allege is unreported. This teaching is amply reaffirmed by *Turoff*:

> As the district court recognized, " 'tax counts can properly be joined with nontax counts where it is shown that the tax offenses arose directly from the other offenses charged.' " ... The most direct link possible between non-tax crimes and tax fraud is that funds derived from nontax violations either are or produce the unreported income.

*Turoff*, at 1043. *Turoff* thus makes transparent what this court presupposed in its earlier severance opinion: joinder of Count Twenty–Three to the balance of the indictment was proper under Rule 8(b), not just Rule 8(a), at least to the degree that the allegedly evaded income came from Wedtech and Ralph Lawrence.

What remained to be shown was that joinder of Count Twenty–Three was proper with respect to the income allegedly derived from Fogliano, inasmuch as the Government did not indict Simon for his dealings with Fogliano. That is where *McGrath* came in. The Government contended, as this court observed, that under *McGrath* "joinder of tax evasion counts *that deal with a single year* is proper

under Rule 8(a)." 672 F.Supp. at 125 (emphasis supplied). In *McGrath*, the defendant was indicted on alleged Hobbs Act violations, but the Government also proved that he had failed to report various forms of unrelated interest income. 558 F.2d at 1104. As noted, the court held that the tax counts and the Hobbs Act counts were properly joined. It then went on to observe that "because the tax counts each deal with a single year, it would have been impossible to split the tax counts into those related and unrelated to the Hobbs Act violations." 558 F.2d at 1106 n. 6. But this is precisely what Simon would have had this court do, in contending that the Fogliano portions of the tax counts should have been split off from the others.[4] This court considered and rejected that contention in its original severance opinion. Even if income allegedly unreported in a tax count derives from a wide variety of sources, the tax count deals with *all* unreported income for a single tax year. It charges but one offense—tax evasion or some other tax crime—that may arise out of diverse components. But the crucial point is that even if it were possible to do what Simon suggests and what *McGrath*

4. The point also holds, of course, if Simon's contention is that all of Count Twenty-Three should have been severed because it was, so to speak, contaminated by the alleged income from Fogliano. The teaching of *McGrath* is that even if such "contamination" exists it does not justify severance.

denies—to split tax counts according to the source of the income—it would avail Simon nothing. For we would then have, to take the present example, three counts of tax evasion for 1985: one for failing to report income derived from Wedtech, a second relating to Ralph Lawrence, and a third relating to Fogliano. These three counts would, however, be *both* offenses of the same or similar character, and so joinable under Rule 8(a), *and* members in a series of acts or transactions constituting an offense, namely tax evasion, and so joinable under Rule 8(b). This demonstrates that the rule of *McGrath*, treating calendar year tax offenses in a single count no matter what the source of the income, is the correct one, no matter which branch of Rule 8 is used.[5] Thus *McGrath*, in conjunction with *Roselli*, demonstrates that Count Twenty-Three is properly joined in this indictment, whether Rule 8(a) or Rule 8(b) is used in the analysis.

Especially now that *Turoff* forcefully underlines the fact that the tax counts in this indictment are properly joined to the non-tax counts under Rule 8(b), Simon's contentions are without force. Because, as has been proved, there is no misjoinder of

5. In fact, if the rule of *McGrath* is rejected, it of course becomes hard to see how to avoid multiplicity in charging a defendant with tax evasion. Surely the hypothetical division of Count Twenty-Three discussed in the text is in fact multiplicitous.

Count Twenty-Three to the balance of this indictment, Simon's motion for a mistrial on this ground must be denied.

IV. *Count Twenty-One*

[3] As noted, many courts before the *Turoff* panel have used sweeping language —what this court has called the primacy thesis—to describe the role of Rule 8(b) in multiple-defendant cases. Such language always goes beyond the facts of the particular cases being decided. The present case involves an unusual fact pattern that is almost certain not to have occurred to courts offering an expansive interpretation of Rule 8(b): a Simon-style joinder in which the party moving for severance, namely Simon, is the only one named in the count. This circumstance makes it necessary to explain why this fact pattern is unusual, and then to show that it presents an exception to the primacy thesis: contrary to Simon's contention, the settled precedent of the Second Circuit not only permits but requires application of Rule 8(a) in this context.

(A) Why Is This Indictment Different from All Other Indictments?

In *Turoff*, Turoff and his coappellants moved to sever two conspiracy counts, in both of which all three coappellants were named. This is the typical situation in which the primacy thesis is asserted: multiple defendants D, E, and F are each

charged with offenses O, P, and Q. Suppose that defendant D moves to sever offense O. Often, though not invariably, O will be charged against D in a separate count in which D alone is named.[6] Thus, in moving to sever O, D is moving not only to sever the offense but simultaneously to sever his codefendants who are also charged with O. If the motion is denied, all three defendants will be tried together on O; if it is granted, D will be tried separately, and E and F together, on O. Abstractly, then, either Rule 8(a) or Rule 8(b) could apply; and to the degree that Rule 8(b) offers defendants greater protection against prejudice, there is a sound policy reason for preferring it to Rule 8(a).[7]

The case is different when D is the *only* defendant charged with O. Suppose, that is, that D is charged with O, P, and Q, but that E and F are charged with P and Q only. In this case, D's motion to sever O is not a motion to sever defendants as well as offenses. It is true that if the motion is granted D will have a solo trial on O, distinct from the three-defendant joint trial on P and Q. But if the motion is denied,

6. One obvious exception arises when conspiracy is the offense, for the coconspirators are of course all named in the same count.

7. *Turoff*, of course, did not present quite the abstract case considered in the text, because the counts the coappellants sought to sever were both conspiracy counts, and all were named in each count.

the result will not be a joint trial on O, because E and F were not charged with O. Here, D is trying to sever a count in which he alone is named, and an offense with which he alone is charged, from the other charges against himself. D is, in effect, acting to sever as a single defendant.

Replacing "D" by "Stanley Simon," "E" and "F" with the other defendants in this case, and "P" and "Q" by, for example, "RICO violation" and "conspiracy to violate RICO," as in Counts One and Two of the indictment in this case, we transform this abstract fact pattern into *United States v. Biaggi*. The abstract discussion attaches even more firmly to the present case when it is recalled that the original indictment, handed up on April 1, 1987, was against Stanley Simon alone. If Simon had moved to sever the Ralph Lawrence count from the indictment at any time before June 3, 1987, when the first superseding indictment added the other defendants, the motion would obviously have been governed by Rule 8(a). This court's holding in its severance opinion was that in this special case, in which Simon moves to sever a count in which he alone is named, the additional defendants make no difference: the motion is still governed, according to the decisions of the Second Circuit, by Rule 8(a).

(B) Second Circuit Precedent

The supposed primacy of Rule 8(b) over Rule 8(a) in multidefendant cases is frequently stated in terms such as these from *Roselli:* "Joinder of charges against multiple defendants is controlled by Rule 8(b), not by Rule 8(a)." 432 F.2d at 898. Like the quotation from *Turoff* discussed above, this formulation, however, embodies the ambiguity between Simon-style and other joinders. What is meant by "joinder of charges against multiple defendants"? Certainly this contemplates Turoff-style joinders—joinder of multiple charges, or even a single charge, say C, against multiple defendants. Unfortunately, "joinder of charges against multiple defendants" might be taken to mean simply "joinder of charges in multiple-defendant cases," which would also cover Simon-style joinders. But the distinction should not be glossed over. In a Simon-style joinder, a single charge is joined against a single defendant in what happens to be a multidefendant case. Count Twenty-One of the indictment in *United States v. Biaggi,* is not an instance of joinder of offenses *against* multiple defendants, because Simon's codefendants are not being charged with the extortion of Ralph Lawrence.[8]

8. The *Roselli* court supported its view by citing *Cupo v. United States,* 359 F.2d 990 (D.C.Cir.), *cert. denied,* 385 U.S. 1013, 87 S.Ct. 723, 17 L.Ed.2d 549 (1966), which the *Turoff* court also cited as follows:

(Footnote continued on following page)

As far as this court has been able to determine, the ambiguity between Turoff-style and Simon-style joinders was not clearly pointed out until Judge Sand's decision in *United States v. Clemente*, 494 F.Supp. 1310 (S.D.N.Y.1980), *aff'd on other grounds sub nom. Fiumara v. United States*, 727 F.2d 209 (2d Cir.), *cert. denied*, 466 U.S. 951, 104 S.Ct. 2154, 80 L.Ed.2d 540 (1984). Judge Sand noted:

> When a defendant in a multiple-defendant case attacks the joinder for trial with defendants who are named in counts with him or in other counts, Rule 8(b) governs....
>
> When a defendant in a multiple defendant case named in one count seeks to

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(Footnote continued.)

> When similar but unrelated offenses are jointly charged to a single defendant, some prejudice almost necessarily results, and the same is true when several defendants are jointly charged with a single offense or related offenses. Rule 8(a) permits the first sort of prejudice and Rule 8(b) the second. But the Rules do not permit cumulation of prejudice by charging several defendants with similar but unrelated offenses.

*Turoff*, at 1043 (quoting *Cupo*, 359 F.2d at 993). If anything, the "cumulation of prejudice" here condemned is that of charging each of several multiple defendants with merely similar offenses—not that of charging a single defendant in a multiple-defendant case with merely similar offenses. Thus *Cupo*, one of the central cases providing a justification for the primacy thesis, does not seem to apply to Simon-style joinders.

> sever other counts in which he alone is charged, Rule 8(a) controls.

494 F.Supp. at 1315 (citations omitted). That is, Judge Sand makes precisely the distinction drawn here between a case in which multiple defendants are jointly charged with multiple offenses (a Turoff-style joinder) and one in which a single defendant in a multidefendant case moves to sever a count in which he alone is charged (a Simon-style joinder).[9]

Judge Sand held that Rule 8(a) applies to the single defendant moving to sever a count in which he is singly charged. Judge Sand was scarcely unaware of the cases that hold that Rule 8(b) governs joinder of offenses in a multiple-defendant case. Indeed, in the first paragraph quoted from *Clemente* above, he cited the very cases the *Turoff* panel cited for that proposition. Closer examination shows, however, that those cases are inapposite.

The leading, and possibly the first, Second Circuit case on the primacy of Rule 8(b) is *United States v. Papadakis*, 510 F.2d 287, 300 (2d Cir.), *cert. denied*, 421 U.S. 950, 95 S.Ct. 1682, 44 L.Ed.2d 104 (1975). This case was quoted by both the district court and the panel in *Turoff*, cited by Judge Sand in *Clemente*, and relied

9. This court cited *Clemente* to the same effect in its first severance opinion. *United States v. Biaggi*, 672 F.Supp. at 124.

upon by Simon in his original severance motion.[10] This court discussed *Papadakis* briefly in its original severance opinion. 672 F.Supp. at 124. The manifest importance of the case makes it worth a return visit.

In *Papadakis*, officers of the New York City Police Department Narcotics Bureau's Special Investigation Unit (SIU) had seized one hundred five kilograms of heroin and cocaine, but had secreted five kilograms which they ultimately decided to sell. Papadakis was one of the buyers. The indictment joined various substantive counts against the defendants in various combinations, including two against Papadakis for purchase and sale of heroin, with two conspiracy counts. The second such count (Count Four of the indictment) charged Papadakis, among others, with conspiracy to violate the federal narcotics laws. The first (Count One) charged the SIU officers with conspiracy to violate the narcotics laws, to obstruct justice, and to obstruct the communication of information to a federal investigator. Papadakis was not named in Count One. On appeal, Papadakis maintained that Count One was misjoined to Count Four and the substantive counts against him. It was in this context

10. The second case cited by Judge Sand and the *Turoff* panel, *United States v. Turbide*, 558 F.2d 1053, 1061 n. 7 (2d Cir.), *cert. denied*, 434 U.S. 934, 98 S.Ct. 421, 54 L.Ed.2d 293 (1977), merely quotes *Papadakis* in a footnote, and has, therefore, no more than cumulative value.

that the Court of Appeals stated that Rule 8(b) governs joinder of offenses in multidefendant cases.

This recitation makes clear how *Papadakis* differs from the present case, and why it was appropriate to apply Rule 8(b) in *Papadakis*. Papadakis challenged the joinder of a count *in which he was not named* to counts in which he was, where the count in which he was not named charged a conspiracy broader than the one he was charged with.[11] In effect, to join Count One to Count Four was to join defendants as well as offenses, and so Rule 8(b) governed.[12] In the present case, to join

11. Discussing a contention of Papadakis's copellant, the court noted that "the first count was broad enough to encompass the fourth count." 510 F.2d at 296.

12. This is true even though it was not as if the defendants in Count One were otherwise completely unrelated to Papadakis. They were also charged in the Count Four conspiracy, and joined with him in the substantive purchase and sale counts. In each of these cases, however, joinder was clearly appropriate under the required Rule 8(b) analysis. The point is that Papadakis found himself the subject of an indictment containing a count in which he was not charged *through* his joinder with the other defendants.

Rule 8(b) expressly provides, of course, for such situations by stating that "all of the defendants need not be charged in each count." This provides all the more reason to suppose that it, rather than Rule 8(a), governs in a *Papadakis*-style situation. A case like *Papadakis* could not even arise under Rule 8(a): the single defendant in an indictment under Rule 8(a) must obviously be charged in each count.

Count Twenty–One to the balance of the indictment is not to join defendants as well as offenses, from the viewpoint of the movant, Stanley Simon; it is to join one count in which Stanley Simon is charged to other counts in which he and others are charged.[13]

Thus, the cases commonly cited—and, in particular, cited in *Turoff*—for the primacy of Rule 8(b) in multiple-defendant cases are not parallel to the present case. Cases that are parallel to the present case, such as *Clemente*, recognize that the single defendant trying to sever a count in which he alone is named presents an exception to the general rule of the primacy of Rule 8(b).

13. It is useful to compare the case the *Papadakis* court cited in applying Rule 8(b), *United States v. Bova*, 493 F.2d 33 (5th Cir.1974). The appellant was charged, along with his codefendant, one Coccuzza, with possession and distribution of heroin in the first two counts of the indictment; in the second two counts the codefendant alone was charged with the sale of heroin. Bova argued that the latter two counts were misjoined with the first two. This is a situation more like *Papadakis* than the present case, one in which the movant is not named in the counts he seeks to sever. As in *Papadakis*, the effect is that of joining a defendant as well as an offense, and Rule 8(b) should apply.

Interestingly, *Bova* is the converse of the present case. If the codefendant Coccuzza had moved to sever Counts Three and Four from Counts One and Two, the situation would have paralleled Simon's, and the question whether to apply Rule 8(a) or 8(b) would have been squarely joined.

The case Judge Sand cited in *Clemente* in support of his claim that Rule 8(a) controls a Simon-style joinder in which it is the Simon defendant moving to sever, *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.) (per curiam), *cert. denied*, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974), is instructive.[14] In *Isaacs*, both codefendants argued that counts in which they were singly charged were misjoined to counts in which they were jointly charged. Thus *Isaacs* squarely raised Simon-style joinder problems. The *Isaacs* court stated:

> When multiple defendants are charged in the same as well as multiple counts, a challenge by a single defendant to joinder of offenses in which he is charged is governed by Rule 8(a). Conversely, when one or more defendants challenge joinder and do not restrict their attack to those offenses which pertain solely to them, Rule 8(b) applies.

*Isaacs*, 493 F.2d at 1158. The citation for the second quoted sentence, pertaining to Rule 8(b), is to *Roselli*. That for the first quoted sentence, pertaining to Rule 8(a), is to *United States v. Sweig*, 441 F.2d 114 (2d

14. As Judge Sand noted, Senior Judge Lumbard of the Second Circuit was a member of the panel in *Isaacs*. Indeed, the entire panel sat by designation: the appeal concerned the bribery conviction of Otto Kerner, Jr., formerly Governor of Illinois and at the time of trial a sitting Judge on the Seventh Circuit. The remaining active Judges of the Seventh Circuit recused themselves. *See Isaacs*, 493 F.2d at 1167–68.

Cir.), *cert. denied*, 403 U.S. 932, 91 S.Ct. 2256, 29 L.Ed.2d 711 (1971).

In *Sweig*, an opinion of Judge Lumbard's, Sweig and his codefendant were charged with conspiracy and other joint offenses, and Sweig was singly charged with perjury relating to certain grand jury testimony. Sweig moved to sever the conspiracy count from the perjury counts, on the ground that the former would prejudice the latter. Judge Lumbard wrote:

> Sweig's claim for a severance "as of right" under Rule 8 fails because Rule 8(a) permits the joinder of two or more offenses against a single defendant if the offenses are based on "two or more acts or transactions connected together or constituting parts of a common scheme or plan." We believe that Sweig's acts constituting the basis for the conspiracy charges and those constituting the basis for the perjury charges were so connected.

441 F.2d at 118. What is crucial here is that Judge Lumbard, in full awareness that *Sweig* was a two-defendant case, and presumably in full awareness of cases from other circuits, such as *Roselli*, that asserted the primacy of Rule 8(b), applied a Rule 8(a) analysis. The rationale can only be that expressed in *Isaacs*, that Sweig was trying to sever a count in which he alone was named, so that his motion had the

*effect* of a Rule 8(a) motion even though there was another defendant.

Thus, the issue of Second Circuit law is simple. Before *Papadakis*, whose blanket statement of the primacy of Rule 8(b) was repeated without analysis in *Turbide* and *Turoff*, there was *Sweig*, a multidefendant case in which Rule 8(a) was applied. How are these two cases to be reconciled? Reconciled they must be, for it is the settled law of the Second Circuit that prior Second Circuit panel opinions bind subsequent Second Circuit panels: "This court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc.*" *United States v. Ianniello*, 808 F.2d 184, 190 (2d Cir.1986), *cert. denied*, — U.S. ——, 107 S.Ct. 3230, 97 L.Ed.2d 736 (1987). *See also In re Jaylaw Drug, Inc.*, 621 F.2d 524, 527 (2d Cir.1980); *United States v. Fatico*, 603 F.2d 1053, 1058 (2d Cir.1979), *cert. denied*, 444 U.S. 1073, 100 S.Ct. 1018, 62 L.Ed.2d 755 (1980); *Ingram v. Kumar*, 585 F.2d 566, 568 (2d Cir.1978), *cert. denied*, 440 U.S. 940, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979). *Papadakis*, of course, was a panel decision, not an *en banc* reconsideration of the doctrine of *Sweig;* and neither in *Papadakis* nor in any other Second Circuit decision that has come to this court's attention is there an analysis indicating that either the United States Su-

preme Court or the Second Circuit sitting *en banc* has overruled the reasoning of *Sweig*. *Cf. Boothe v. Hammock*, 605 F.2d 661, 663–64 (2d Cir.1979) (Second Circuit analysis of Supreme Court decision concludes that Supreme Court overruled earlier Second Circuit cases by implication).

*Sweig* and *Papadakis* are, of course, perfectly consistent. *Papadakis*, however, must be limited to the situation discussed in the case it cites, *United States v. Bova*, 493 F.2d 33 (5th Cir.1974), in which a defendant D moves to sever a count in which another defendant E is charged but D is not, or to the *Turoff* situation in which both D and E are charged with a particular offense. *Cf. Isaacs*, 493 F.2d at 1158 ("[W]hen ... defendants challenge joinder and do not restrict their attack to *those offenses which pertain solely to them*, Rule 8(b) applies" (emphasis supplied).). In a case such as *Bova* or *Papadakis*, potential prejudice to D is clear; an offense with which he is not charged appears in the indictment against him, simply because he is joined to *E*. An offense with which D is not charged is joined to him *through* his joinder to E. Here it is most sensible to regard the motion for severance as arising under Rule 8(b). So too, if both D and E are charged with the same offense, D's motion for severance is one for a separate trial *on that offense*, and to that extent is appropriately regarded as a motion to sev-

er his codefendant. In that situation, as Judge Sand observed in *Clemente*, Rule 8(b) clearly controls.

The situation that arose in *Sweig*, *Clemente*, and the present case is quite different. As noted, if Simon's motion to sever Count Twenty-One were granted, the result would not be that Simon gains a solo trial whereas he would have had a joint trial on that count if the motion were denied. If the motion were granted, there would be no sense in which Simon was severed from any of his codefendants *on Count Twenty-One*, for none are named in that count. The effect of the motion is to sever one part of the case against Simon from another part of the case against Simon, without affecting the rest of the trial. Thus, as the *Sweig* and *Clemente* courts recognized, such a motion is a Rule 8(a) motion, despite the presence of other defendants, in a way the motions discussed above are not.

This court sees no alternative but to hold that *Sweig* and *Papadakis* are consistent and binding. This entails that a motion for severance such as Simon offers is governed by Rule 8(a), not Rule 8(b). That is, a Simon-style joinder in which the party in Simon's position is moving for severance is an exception to the primacy thesis. In view of this conclusion of Second Circuit law, the court sees no need to reevaluate its conclusion that the alleged extortion of

Ralph Lawrence is an offense of "the same or similar character" to the Wedtech-related extortions with which Simon is charged, holds that its original decision to deny a severance was proper, and therefore denies Simon's motion for a mistrial.

V. *Count Twenty-One—Rule 8(b) Analysis*

[4] Finally, the court observes that even if Rule 8(b) rather than Rule 8(a) applied to Simon's motion, it should be denied. The demonstration is important for the completeness of the court's holding and analysis. The Rule 8(a) analysis has demonstrated, and rested on, an asymmetry between defendants: Rule 8(a) applies to a defendant seeking to sever a count against himself that is not a count against anybody else. The decisions canvassed herein suggest that things are different when a codefendant seeks to sever such a count. In the present case, the decisions suggest that if anybody other than Simon had moved to sever Count Twenty-One, *their* motion would have been governed by Rule 8(b) rather than Rule 8(a). Before trial, John Mariotta indeed joined Simon's motion, his counsel remarking that "Mariotta would be extremely prejudiced by a joint trial with Simon where Simon is tried on counts which have nothing to do with Mariotta or Wedtech." Affidavit of Jeffrey Glekel at 2 n.*. In its pretrial opinion, this court construed Mariotta to be moving for relief

under Fed.R.Crim.P. 14.[15] For the sake of completeness, the court now observes that even had Mariotta's motion been construed as one for a severance under Rule 8(b), the motion was correctly denied.[16]

15. The court takes this occasion to observe that counsel for defendant Peter Neglia purported to join Simon's present motion on the ground of "spillover prejudice." Trial Transcript at 18604. A motion for relief from prejudicial joinder is made under Fed.R.Crim.P. 14, not Rule 8, and as such is expressly required to be made before trial by Fed.R.Crim.P. 12(b)(5). Neglia's motion is therefore denied.

16. There is at least a question whether there even *is* any significant distinction in the Second Circuit between Rule 8(b)'s requirement of the "same series of acts or transactions constituting an offense or offenses" and the requirements of Rule 8(a). For in *United States v. Bernstein*, 533 F.2d 775 (2d Cir.), *cert. denied*, 429 U.S. 998, 97 S.Ct. 523, 50 L.Ed.2d 608 (1976), Judge Oakes wrote that "it is well established that under Fed.R.Crim.P. 8(b) joinder of multiple defendants is proper if they are alleged to have participated in the same series of acts which are part of a common scheme or plan, or connected together," 533 F.2d at 789 (footnote omitted). This is, of course, the language of Rule 8(a), not the "same series of acts or transactions" formulation of Rule 8(b). It may be, then that the Court of Appeals has collapsed Rule 8(b) into Rule 8(a); at any rate, this court has not uncovered any Second Circuit discussions that would indicate the contrary.

For the purposes of the present discussion, however, the court will assume that there is some distinction between the requirements of Rule 8(a) and Rule 8(b) in the Second Circuit. *See* 1 C. Wright, *supra* note 3, § 144 at 502 & n.

(Footnote continued on following page)

It is clear that in conspiracy cases, particularly RICO cases, the mere allegation of conspiracy is sufficient to tie defendants closely enough together for Rule 8(b) purposes. A RICO count itself, "virtually by definition, ... constitute[s] a 'series of acts or transactions' sufficiently intertwined to permit a joint trial of all defendants." *United States v. Bagaric*, 706 F.2d 42, 69 (2d Cir.), *cert. denied*, 464 U.S. 840, 104 S.Ct. 133, 134, 78 L.Ed.2d 128 (1983). Equally, the racketeering acts constituting the alleged RICO violation are closely enough related to permit a joint trial under Rule 8(b).[17] The only question is whether

(Footnote continued.)

12 (collecting cases, including *Bernstein*, and discussing "common scheme" and "connected together" interpretation of Rule 8(b) adopted by Second and other Circuits, without drawing conclusion that interpreting Rule 8(b) in terms of Rule 8(a) makes "same transaction" language of Rule 8(b) surplusage and seems to vitiate primacy thesis).

17. *See United States v. Weisman*, 624 F.2d 1118, 1129 (2d Cir.), *cert. denied*, 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980):

> If ... [predicate] acts could properly be considered part of a "pattern of racketeering activity," we see no reason why they could not similarly constitute part of a "series of acts or transactions constituting an offense" within the meaning of Rule 8(b). Indeed, a construction of Rule 8(b) that required a closer relationship between transactions than that necessary to establish a "pattern of racketeering activity" under RICO might possibly prohibit joinder in circumstances where Congress clearly envisioned a single trial.

Simon's alleged extortion of Ralph Lawrence is part of the same series of acts or transactions as any of the racketeering acts, so as to sustain joinder under Rule 8(b).[18]

In its original severance opinion this court was content to notice that the indictment, as supplemented by a letter provided by the Government in response to an order of the court, alleged that Simon's extortion of Ralph Lawrence and the other extortions charged against Simon were crimes of "the same or similar character" and so properly joinable under Rule 8(a). *United States v. Biaggi*, 672 F.Supp. at 124–25. To establish that they are joinable under Rule 8(b) requires slightly deeper probing. It is Ralph Lawrence who provides the

18. It is important to observe that we are asking whether *Simon*'s activities, as charged in the racketeering acts in which he is named and in Count Twenty-One, form a series of acts or transactions that are joinable under Rule 8(b). In essence, this is to apply a Rule 8(b) analysis to a Rule 8(a) situation—joinder of offenses against a single defendant—as the primacy thesis commands.

In the present case, only John Mariotta made anything that could be construed as a Rule 8(b) motion before or during trial, and so only he has standing to argue Rule 8 misjoinder on appeal. In determining whether Count Twenty-One is properly joined to the balance of the indictment, however, we do *not* ask whether it is part of a series of acts or transactions with Mariotta's activities. It is enough that the charges against Simon form a whole joinable under Rule 8(b) and that Simon be joinable as a defendant to Mariotta under 8(b).

nexus between Count Twenty-One and the extortion racketeering acts charged against Simon; it is Simon's pattern of activities with Ralph Lawrence that constitutes the "series of acts or transactions constituting ... offenses." Count Twenty-One charges Simon with extorting Lawrence by giving him pay raises and then forcing him to kick back portions of those raises in a remarkable variety of forms. According to the evidence that emerged at trial, not only did Lawrence provide Simon with such monetary benefits and other things of value as petty cash, payment for meals, and gambling chips; Lawrence also provided Simon with services outside the scope of his duties as Assistant to the Borough President of the Bronx. Such services ranged from the petty and even degrading—taking Simon's laundry to the dry cleaners, driving his children to school, buying cat food, *see, e.g.*, Trial Transcript at 10854-57—to intermediation in the racketeering acts Simon is charged with in the indictment. In particular, the Government has charged that Lawrence was Simon's courier for the payment of a substantial part of the $50,000 in cash and other benefits Simon is charged with receiving from Wedtech as one of the racketeering acts.

The charged extortion from Wedtech, then, was just one of the manifold activities in which Lawrence is alleged to have acted as Simon's intermediary. Some of those activities are alleged by the Government to

have included extortion from Lawrence himself; others are alleged to constitute extortion from Wedtech. But the fact that the victims are unrelated does not show that the alleged extortions are not part of the same series of transactions constituting offenses. All it shows is that Simon turned on his own instrument for carrying out his extortionate designs.

Some Circuits have set out a test for Rule 8(b) joinder of which the Fifth Circuit's statement in *United States v. Harrelson*, 754 F.2d 1153 (5th Cir.1985), *cert. denied*, 474 U.S. 908, 106 S.Ct. 277, 88 L.Ed.2d 241 (1985), is typical:

> Whether the counts of an indictment fulfill the "same series" requirement is determined by examining " 'the relatedness of the facts underlying each offense.... [W]hen the facts underlying each offense are so closely connected that proof of such facts is necessary to establish each offense, joinder of defendants and offenses is proper.' ... When there is no 'substantial identity of facts or participants between the two offenses, there is no "series" of facts under Rule 8(b).' "

754 F.2d at 1176–77 (citations omitted). *See also, e.g., Roselli*, 432 F.2d at 899. Even under this test, which appears stricter than any reasonably attributable to the Second Circuit, joinder would be proper under Rule 8(b). Here, there is certainly a substantial identity of participants. And

the relatedness of the underlying facts can be seen by considering what would be necessary to prove Count Twenty-One. Count Twenty-One charges Simon with demanding and obtaining a portion of Lawrence's salary in extortionate fashion. In order to prove that Simon acted under color of official right or that Lawrence acted out of fear of economic loss, it is not enough to show that Lawrence conferred benefits on Simon; the Government would have to introduce proof of Lawrence's salary increases, and to establish that Simon had induced Lawrence, under color of official right or through fear, to kick back a portion of those increases. Such proof could have included—and at trial did include—an actual or perceived threat by Simon to deprive Lawrence of his job if he did not accept Simon's offer, which Lawrence allusively characterized as one he "couldn't refuse." A threat to fire Lawrence, however, shows that Simon's extortion scheme was larger than the one alleged in Count Twenty-One; the *quid pro quo* was not (or not only) Lawrence's undertaking to kick back part of his salary increase to Simon, but to accept the offer he couldn't refuse—that is, to continue acting as Simon's factotum, providing him with services to which Simon was not entitled as a result of his office, including acting as courier for the alleged extortion payments from Wedtech. That is, the alleged extortions of two different entities—Lawrence and Wedtech—were

embedded in a single extortionate scheme in which Lawrence was Simon's instrument. Thus, to prove the extortion of Lawrence, the Government would necessarily have to bring out the full story of Simon's use of Lawrence, including his function as a go-between for Simon and Wedtech, which would in turn require proof of Simon's extortion of Wedtech. In this way, Count Twenty–One and the extortion racketeering acts against Simon are parts of a series of transactions constituting multiple extortions, and are therefore sufficiently related to satisfy the joinder requirements of Rule 8(b).

For all the reasons stated above, Simon's motion for a mistrial is denied.

**APPENDIX E - Constitution and Statutory Provisions**

**Constitution, Amendment V**

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; ... nor be deprived of life, liberty or property, without due process of law;"

**Federal Rule of Criminal Procedure 8**

> "(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a commons scheme or plan.
>
> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts

together or separately and all of the defendants need not be charged in each count."

**Federal Rule of Criminal Procedure 52(a)**

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

**Title 18 USC, Section 1962, Subdivision (c)**

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

**Title 18 USC, Section 1962, Subdivision (d)**

"It shall e unlawful for any person to conspire to violate any of the provisions of subsections 1 (a), (b) or (c) of this section."

**Title 18 USC. Section 1951 Subdivision (b)(2)**

"(b) As used in this section ... The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened forced, violence, or

fear, or under color of official right."

**Title 18 USC, Section 1951 Subdivision (b)(3)**

"(b) As used in this section ... The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United states has jurisdiction."

**Title 18 USC, Section 1623 Subdivision (a)**

"(a) Whoever under oath ... in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration ... shall be fined not more than $10,000 or imprisoned not more than five years, or both.

**Title 26 USC, Section 7201**

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony ..."

**Title 28 USC, Section 1254 Subdivision (1)**

> "Cases in the court of appeals may be reviewed by the Supreme Court ... by writ of certiorari granted upon the petition of any party of any civil or criminal case, before or after rendition of judgment or decree ..."

(2) (2) (2)

Nos. 90-785, 90-931, and 90-937

# In the Supreme Court of the United States

OCTOBER TERM, 1990

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STANLEY SIMON, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

MARIO BIAGGI, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

RICHARD BIAGGI, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether two counts charging petitioner Simon with extortion and tax evasion were properly joined with other counts in the indictment.

2. Whether there was a disparity between the allegations in the indictment and the proof at trial concerning the date of an extortionate demand by petitioner Simon that constituted an impermissible amendment of the indictment.

3. Whether the court of appeals was correct in concluding that the erroneous inclusion of certain language in the jury instruction on extortion did not prejudice petitioner Simon.

4. Whether the district court properly denied petitioner Simon's motion for a new trial, which was based on new evidence suggesting that a government witness had understated the extent of his admitted tax evasion.

5. Whether the district court properly denied petitioner Mario Biaggi's request for the discovery of certain documents and the issuance of certain trial subpoenas.

6. Whether the district court correctly excluded evidence of petitioner Mario Biaggi's state of mind, after Biaggi withdrew the proffer of evidence.

7. Whether the district court properly found that the government made no use of immunized testimony given by petitioner Richard Biaggi before a state grand jury.

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 36-142)[1] is reported at 909 F.2d 662. The opinions of the district court denying petitioner Simon's motions for severance and

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[1] "Pet. App." refers to the appendix to the petition in No. 90-785.

mistrial (Pet. App. 145-184, 185-221) are reported at 672 F. Supp. 112 and 705 F. Supp. 852. Other district court opinions are reported at 674 F. Supp. 1034, 675 F. Supp. 790, and 705 F. Supp. 790, 830, 848, 864, and 867.

## JURISDICTION

The judgment of the court of appeals was entered on June 29, 1990. A petition for rehearing in No. 90-785 was denied on July 30, 1990. Pet. App. 143-144. A petition for rehearing in No. 90-931 was denied on September 10, 1990. 90-931 Pet. App. 71a-73a. The petition for a writ of certiorari in No. 90-785 was filed on October 29, 1990. The petitions for a writ of certiorari in No. 90-931 and No. 90-937 were both filed on December 10, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners and three others were convicted on various charges arising out of the affairs of the Wedtech Corporation, a manufacturing company that received defense contracts. Petitioners Mario Biaggi and Stanley Simon were each convicted of participating in and conspiring to participate in the affairs of the Welbilt Electronic Die Corporation (later known as the Wedtech Corporation) through a pattern of racketeering activity, in violation of 18 U.S.C. 1962 (c) and (d) (Counts 1 and 2). Mario Biaggi was also convicted on two counts of extortion, in violation of 18 U.S.C. 1951 (Counts 3 and 10), two counts of bribery, in violation of 18 U.S.C. 201(c) (1982) (Counts 4 and 11), one count of receiving a gratuity, in violation of 18 U.S.C. 201(g) (1982) (Count 5), two counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 6 and 12), three counts of making false statements, in viola-

tion of 18 U.S.C. 1001 (Counts 7, 8, and 9), two counts of filing false tax returns, in violation of 26 U.S.C. 7206(1) (Counts 14 and 15), and one count of perjury, in violation of 18 U.S.C. 1623 (Count 18). Simon was also convicted on three counts of extortion (Counts 19-21), one count of perjury (Count 22), and one count of tax evasion (Count 23). Petitioner Richard Biaggi was convicted on one count each of aiding and abetting bribery (Count 4), receiving a gratuity (Count 5), and mail fraud (Count 6), and on two counts of filing false tax returns (Counts 16 and 17).

Mario Biaggi was sentenced to a total of eight years' imprisonment and a $242,000 fine. Simon was sentenced to a total of five years' imprisonment and a $70,000 fine. Richard Biaggi was sentenced to a total of two years' imprisonment and a $71,000 fine. Pursuant to agreements between the government and certain of the defendants, the district court also entered judgments of forfeiture for $350,000 against Mario Biaggi and $25,000 against Simon. The court of appeals affirmed on all the counts on which Mario Biaggi and Simon were convicted; it reversed Richard Biaggi's convictions on Counts 4, 5, and 6 and dismissed those counts; and it remanded the remaining counts against Richard Biaggi for resentencing. Pet. App. 142; Gov't C.A. Br. 256-263.[2]

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[2] Co-defendant John Mariotta was convicted on both RICO counts, two counts of mail fraud, four counts of tax evasion, and three counts of bribery. He was sentenced to a total of eight years' imprisonment and a $291,000 fine. A judgment of forfeiture was entered against him for $11,700,000. The court of appeals affirmed his mail fraud and tax convictions, and reversed his convictions on the RICO and bribery counts; those counts were remanded for a new trial.

Co-defendant Bernard Ehrlich was convicted on both RICO counts, two counts of extortion, two counts of mail fraud, three counts of bribery, and two counts of receiving a gratuity. He was sentenced to

1. The evidence adduced at trial, the sufficiency of which is not now in dispute, is summarized in the opinion of the court of appeals. It established that the company later known as Wedtech was a small sheet metal fabricating company located in the South Bronx area of New York City. It was founded by petitioners' co-defendant John Mariotta, who is of Puerto Rican descent. In 1975, Wedtech was accepted into the Small Business Administration's "Section 8(a)" program, under which minority-owned businesses are eligible for government contracts without competitive bidding. Pet. App. 59.

In 1978, petitioner Mario Biaggi, then a congressman from the Bronx, met Mariotta and Fred Neuberger, a co-owner of Wedtech. Biaggi was at that time a partner in the law firm of Biaggi & Ehrlich, which was retained by Wedtech for an annual retainer of $20,000. The retainer was later increased in stages to $150,000. Biaggi withdrew as a member of the law firm in 1979, after the House of Representatives adopted a rule limiting its members' outside income. The law firm bought Biaggi's interest in the firm for $320,000, payable over ten years; he remained in an "of counsel" relationship to the firm. Biaggi's son, petitioner Richard Biaggi, became a partner in the firm in 1983. Pet. App. 59-60.

Starting in 1978, Mario Biaggi contacted various government officials on behalf of Wedtech, urging that Wedtech

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six years' imprisonment and a $222,000 fine. He was also ordered to forfeit $350,000. The court of appeals affirmed each of his convictions.

Co-defendant Peter Neglia was convicted on the substantive RICO count, and one count each of bribery, receipt of a gratuity, and obstruction of justice. He was sentenced to three years' imprisonment and a $30,000 fine. His RICO conviction was reversed and dismissed, and the bribery and obstruction of justice counts were remanded for resentencing.

None of these co-defendants has filed a petition for a writ of certiorari.

be awarded defense contracts through the SBA's Section 8(a) program and loans from the Economic Development Administration. Wedtech also benefited from the services of attorney E. Robert Wallach (who frequently contacted White House ~~Chief~~ official Edwin Meese on Wedtech's behalf), former White House assistant Lyn Nofziger, and other Washington lobbyists. Pet. App. 60.

In 1982, Wedtech was awarded a $27 million contract to make small engines for the Army, and in 1984 Wedtech was awarded a $24 million contract to make pontoons for the Navy. Despite these contracts, Wedtech experienced serious financial difficulties and filed for bankruptcy at the end of 1986. Pet. App. 60-61.

The evidence against petitioners and their co-defendants came primarily from four Wedtech officials, Fred Neuberger, Mario Moreno, Lawrence Shorten, and Anthony Guariglia, who all pleaded guilty to various offenses arising from their own activities at Wedtech and who testified pursuant to grants of use immunity. Pet. App. 61. The court of appeals grouped the evidence into six categories, four of which are particularly relevant to petitioners' convictions: (1) the five percent stock interest; (2) the $50,000 Loop Drive payment; (3) the benefits to Simon; and (4) the Section 8(a) fraud.[3]

a. *The Five Percent Stock Interest*. In 1983, Wedtech made a public offering of its stock. At that time, the company issued two and one-half percent of its stock to Bernard Ehrlich and an equal percentage to Richard Biaggi. The government's evidence showed that Richard was given his shares as a nominee for his father, that the total five percent stock interest was paid to influence Congressman

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[3] The other two categories were a slush fund used by Mariotta and other Wedtech officials, Pet. App. 71-72, 126-127, and the bribery of SBA official Peter Neglia, *id.* at 72-73, 102-105.

Biaggi to use the power of his office to help secure government contracts for Wedtech, and that the payment was made in response to an extortionate demand by Congressman Biaggi, aided by Ehrlich. Both Ehrlich and Richard Biaggi later sold about one-third of their stock, each realizing more than $600,000. Pet. App. 61-62; Gov't C.A. Br. 19-20, 24-27.[4]

b. *The $50,000 Loop Drive Payment.* After Wedtech obtained the contract to make pontoons for the Navy, it needed a waterside property for testing the vessels. The company identified a site known as One Loop Drive in the Bronx, a property owned by the city of New York. In order to obtain a lease from the city, Ehrlich sought the help of petitioner Stanley Simon, then the Bronx Borough President and a member of the Board of Estimate, which was responsible for approving city leases. Simon arranged for Wedtech officials to meet with the appropriate city official, and Ehrlich negotiated a three-year lease for Wedtech at a price well below what the city had originally requested. After the lease was negotiated, in June 1984, it had to be approved by the Board of Estimate. Wedtech needed prompt approval in order to satisfy the terms of its contract with the Navy, but the matter failed to pass at the Board's June 13 meeting and was deferred until the July meeting. Mario Biaggi called Simon and demanded his assistance in having the lease approved at the next meeting. The Board approved the lease at its July 12 meeting. Pet. App. 62-63; Gov't C.A. Br. 33-34.

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[4] The court of appeals found ample evidence to establish that the stock was held by Richard Biaggi for his father, but it found insufficient evidence that Richard was aware of the unlawful nature of the transaction. It therefore reversed Richard's convictions on Counts 4, 5, and 6 (aiding and abetting bribery, gratuity, and mail fraud), but let stand his convictions for filing false tax returns. Pet. App. 88-94.

On July 13, Wedtech paid Ehrlich's law firm $50,000 for "Ports and terminal matter. Services rendered June 1984." The evidence supported the conclusion that the $50,000 was a bribe to Mario Biaggi to induce him to use his official position to secure approval for the Loop Drive Lease, and a payment in response to extortionate demands by Mario Biaggi. Pet. App. 63-64, 99-102.

c. *Benefits to Simon.* Neuberger testified that, at a benefit function at the Yonkers racetrack, Simon made an extortionate demand for $50,000 in connection with the Loop Drive lease. Simon told Neuberger that he needed help with his reelection campaign, and that he expected $75,000 or $100,000. Neuberger objected that it was illegal for a corporation to make a campaign contribution. Simon suggested making the payment in the form of donations to various charitable organizations and "some other expenses." They agreed on a figure of $50,000.[5] Neuberger then gave instructions to a Wedtech employee to release a total of $50,000 from a Wedtech account for purposes that Simon would later indicate to her. Ultimately, the major expenditures were $20,000 in charitable contributions to two synagogues, $10,000 as a political contribution to "Friends of Simon," and $10,000 in cash. The Wedtech employee gave the $10,000 in cash in a sealed envelope to Ralph Lawrence, Simon's assistant in the Bronx Borough President's office, and Lawrence gave the unopened envelope to Simon. Pet. App. 64-66; Gov't C.A. Br. 34.

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[5] Neuberger testified that the Yonkers racetrack meeting occurred in June 1984. Another Wedtech employee placed the meeting in November 1984. In the defense case, Simon introduced evidence that he had met Neuberger at the Yonkers racetrack in November 1984, not June 1984. In its summation, the government stated that the meeting at the Yonkers racetrack "probably" took place in November 1984. Pet. App. 64-65, 114; Gov't C.A. Br. 190.

Simon received three other unlawful benefits, one of which was paid by Wedtech. First, after Ehrlich told Moreno that Simon wanted Wedtech to hire Henry Bittman, Simon's brother-in-law, Wedtech hired Bittman as a payroll clerk and eventually raised his salary to $35,000. Wedtech employees testified that Bittman's work was unsatisfactory but that he was kept on the payroll because of a promise to Simon. Pet. App. 67; Gov't C.A Br. 14, 35. Second, after Simon's assistant Ralph Lawrence received a salary increase, Simon demanded one-half of all of Lawrence's subsequent salary increases as a kickback. Over the next three and one-half years, as Lawrence's salary rose to approximately $52,000, he provided half of his salary increases to Simon, for a total of about $14,000, in the form of cash, goods, and services. Pet. App. 68; Gov't C.A. Br. 43. Third, after Simon introduced Sabino Fogliano, a Bronx contractor, to various New York City officials, Fogliano complied with Simon's request to supply approximately $9,000 worth of marble and tile work for Simon's home. Fogliano never billed Simon for the work because he knew he would not be paid. Pet. App. 69; Gov't C.A. Br. 44-45.

d. *The Section 8(a) Fraud.* A company qualifies for the SBA's Section 8(a) program if it is at least 51 percent owned by "one or more socially and economically disadvantaged individuals" (15 U.S.C. 637(a)(4)(A)(i)(I)), a category that includes Hispanic Americans (15 U.S.C. 637(a)(5); 13 C.F.R. 124.105(b)). Pet. App. 70. Mariotta, who is of Puerto Rican descent, and his partner Neuberger sought to qualify Wedtech for the Section 8(a) program. To do so, they created false documents to make it appear that Mariotta owned two-thirds of Wedtech's stock, although in fact each of the two men owned half. Pet. App. 70; Gov't C.A. Br. 10.

When Wedtech became a public corporation, Mariotta and other individuals (including Mario Biaggi) devised

fraudulent stock purchase agreements to make it appear that Mariotta retained an ownership interest of over 50 percent in the company. Insiders who had received stock purported to assign their interests to Mariotta, who was obligated to pay for the shares over a ten-year period; upon Mariotta's failure to pay, the shares would revert to the insiders. Mariotta verbally agreed not to make the payments, thereby ensuring that the insiders would retain their interests in the company. Pet. App. 70-71, 111-112, 126-127; Gov't C.A Br. 28-31.

2. The court of appeals addressed a broad range of claims raised by petitioners and their co-defendants. Pet. App. 36-142. The court rejected Simon's claims that two counts were misjoined (*id.* at 75-79); that the indictment was constructively amended at trial with respect to the $50,000 extortion from Wedtech (*id.* at 115 n.10); and that the district court's extortion instruction required reversal (*id.* at 133-138). The court also considered and rejected Mario Biaggi's claims that he was unfairly denied discovery of certain documents and the issuance of certain trial subpoenas (*id.* at 131-133) and that he was erroneously denied permission to introduce state of mind evidence regarding the issuance of Wedtech shares to Richard Biaggi (*id.* at 129-131). Finally, the court considered and rejected Richard Biaggi's claim that he was entitled to a hearing concerning the claimed use of immunized testimony that he had given to a state grand jury. *Id.* at 115-119.

## ARGUMENT

1. Petitioner Simon maintains (90-785 Pet. 12-20) that two counts against him, Counts 21 and 23, were improperly joined with the other counts. Count 21 charged Simon with extorting from Ralph Lawrence, his assistant in the Bronx Borough President's office, half of Lawrence's salary

increases. Count 23 charged Simon with tax evasion for the year 1985, based on his failure to report the $50,000 in benefits from Wedtech, the salary kickbacks from Lawrence, and the $9,000 of tilework from Sabino Fogliano.

The district court originally denied Simon's severance motion (Pet. App. 180-183) on the authority of Rule 8(a) of the Federal Rules of Criminal Procedure, which provides that two or more offenses may be joined if the offenses "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." During the trial of this case, the court of appeals decided *United States* v. *Turoff*, 853 F.2d 1037 (2d Cir. 1988), holding that, if a misjoinder claim is made based on multiple defendants and multiple offenses, it should be analyzed under Rule 8(b), which governs joinder of defendants.[6] Simon then moved for a mistrial, reasserting his misjoinder claim. The district court denied the motion. Pet. App. 185-221. It determined that, even after *Turoff*, Rule 8(a) remains the appropriate provision when, as here, a defendant in a multiple-defendant case objects to joinder of counts in which he alone is charged. Pet. App. 191-195. But the court also specifically decided that, even if Rule 8(b) were applicable, joinder was proper. Pet. App. 191, 197, 217-221.

Without resolving the question whether Rule 8(a) might properly apply in these circumstances, the court of appeals

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[6] Fed. R. Crim. P. 8(b) provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

agreed with the district court that joinder was proper even under Rule 8(b). Pet. App. 75-78. Petitioner's objection thus does not go to the proper legal standard; rather, it goes only to the application of Rule 8(b) to the facts of this case. This case-specific application of the Rule does not warrant review.

In any event, the courts below were correct in their application of the Rule. With regard to Count 21, although Simon's extortion of Lawrence involved a different victim, the extortion of Lawrence and the extortion of Wedtech were part of the "same series of acts or transactions." Fed. R. Crim. P. 8(b). As the court of appeals explained, Simon used Lawrence as the means of obtaining benefits from Wedtech (particularly the $10,000 payment), and "[p]roof of one scheme was helpful to a full understanding of the other." Pet. App. 77; see also *id.* at 214-221. Thus there was a sufficient relatedness of facts and participants to fulfill the "same series" requirement of Rule 8(b). *United States* v. *Attanasio*, 870 F.2d 809, 814-815 (2d Cir. 1989); *United States* v. *Turoff*, 853 F.2d at 1044.

With regard to Count 23, the core of the tax count concerned the unreported income extorted from Wedtech and from Lawrence. Pet. App. 78, 197. As to those sources, joinder was clearly appropriate. See *United States* v. *Turoff*, 853 F.2d at 1043 ("The most direct link possible between non-tax crimes and tax fraud is that funds derived from non-tax violations either are or produce the unreported income."); *United States* v. *Coppola*, 788 F.2d 303, 306-307 (5th Cir. 1986); *United States* v. *Kenny*, 645 F.2d 1323, 1344 (9th Cir.), cert. denied, 452 U.S. 920 (1981). As the court of appeals observed, moreover, since a tax count deals with all taxes evaded on a single year's income, it also was not error to join the tax count simply because it included the "relatively small amount of income from the unrelated trans-

action involving Fogliano." Pet. App. 78. Accordingly, Simon's motion for a severance was properly denied.

2. Petitioner Simon also contends (90-785 Pet. 30-34) that the proof at trial concerning his extortion of Wedtech produced an impermissible amendment of the indictment. His claim relates exclusively to the date on which he made an extortionate demand of Wedtech official Neuberger for $50,000 in exchange for Simon's influence on behalf of the Loop Drive lease. Count 1 alleged that Simon's demand for $50,000 occurred "[i]n or about mid-1984." C.A. App. A155. Count 1 also alleged, in Racketeering Act 4, that Simon extorted the money "[b]eginning in or about mid-1984 and continuing up to and including early 1986." C.A. App. A166. Count 19, the substantive extortion count concerning the $50,000, similarly alleged that the extortion occurred "[b]eginning in or about mid-1984 and continuing up to and including early 1986." C.A. App. A196. Although Neuberger testified that Simon first made the extortionate demand at the Yonkers Raceway in June 1984, the government ultimately acknowledged, on the basis of other evidence, that the Yonkers racetrack meeting "probably" occurred in November 1984. See note 5, *supra*. Simon argues that the government thereby constructively amended the indictment, in violation of the Fifth Amendment. The court of appeals correctly rejected this argument.

As the court of appeals concluded (Pet. App. 115 n.10), the evidence that the demand was made in November did not reflect a modification of an essential element of the offense, and thus did not amount to an amendment of the indictment. See *United States* v. *Miller*, 471 U.S. 130, 136, 138-140 (1985); *United States* v. *Attanasio*, 870 F.2d at 817; *United States* v. *Begnaud*, 783 F.2d 144, 147 & n.4 (8th Cir. 1986); *United States* v. *Weiss*, 752 F.2d 777, 787 (2d Cir.), cert. denied, 474 U.S. 944 (1985). Simon was convicted of the offense charged in the indictment, extortion under

color of official right. The evidence showed the participants, the victim, and the nature of the extortionate scheme to be precisely those charged in the indictment. Although there was a difference between Neuberger's testimony and the defense evidence regarding the date of the meeting between Neuberger and Simon, the date on which an extortion occurs is not an essential element of a federal extortion offense. See *United States* v. *Leibowitz*, 857 F.2d 373, 379 (7th Cir. 1988), cert. denied, 489 U.S. 1088 (1989); *United States* v. *Heimann*, 705 F.2d 662, 665-666 (2d Cir. 1983).[7]

As the court of appeals concluded, the discrepancy in the proof regarding the date of Simon's demand did not result in an amendment of the indictment. Pet. App. 115 n.10. Indeed, the language of the indictment, alleging that the extortion took place "in or about mid-1984," and that it continued into 1986, was broad enough to cover an initial demand occurring either in June or November 1984. Although the evidence showed that the date of the offense was probably later than the government witness recalled, there was no doubt as to the nature of the offense charged, and Simon could not have been misled as to the nature of the charge against him as a result of the confusion as to the date of the meeting. Petitioner's claim thus is not meritorious. *United States* v. *Attanasio*, 870 F.2d at 817; *United States* v. *Nersesian*, 824 F.2d 1294, 1323 (2d Cir.), cert. denied, 484 U.S. 957 (1987); *United States* v. *Heimann*, 705 F.2d at 666-667.

3. Petitioner Simon further contends (90-785 Pet. 20-24) that the district court erred in that portion of the jury

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[7] Simon suggests that occurrence of the meeting in June was an essential element of the extortion because a vote approving the Loop Drive lease occurred in July. Pet. 30, 32, 34. As the court of appeals noted, however, the Loop Drive lease had not been executed in November, and Simon's help was still needed to complete the transaction. Pet. App. 114-115.

instructions in which it explained the "inducement" element of extortion. Simon argues that that portion of the charge permitted the jury to infer inducement from the receipt of entirely lawful campaign contributions.

The charge at issue was as follows (Pet. App. 133):

> [I]f the defendant repeatedly accepted money or benefits from representatives of Wedtech, and if the amount of money or benefits accepted could reasonably have affected the defendant's exercise of his duties, then you may find defendant induced the payment of money.

The court of appeals found this language erroneous in the context of this case, explaining why it was inappropriate here, despite the fact that the same language had been approved in another case, *United States* v. *O'Grady*, 742 F.2d 682, 694-695 (2d Cir. 1984) (en banc) (concurring opinions) (Pet. App. 135):

> The *O'Grady* standard, permitting an inference of inducement from repeated acceptance of substantial benefits, makes sense as applied to an appointed official who has no lawful basis for receiving cash or other benefits from those conducting business with his agency. It does not apply, however, to an elected official who may lawfully receive campaign contributions. Permitting an inference of inducement from an elected official's repeated acceptance of substantial benefits would subject every recipient of campaign contributions to conviction for extortion.

The court went on, however, to hold that the instructional error did not require the reversal of Simon's conviction, because "[t]here was no issue put to the jury in Simon's case as to whether any payment was a lawful political contribution or an unlawful extortion or bribe." Pet. App. 137. As the court explained, neither the prosecution nor Simon con-

tended that the Lawrence kickbacks or the job for Bittman were campaign contributions. *Ibid.* To be sure, the government contended that the $50,000 Simon demanded at the Yonkers Raceway was a campaign contribution that Simon extorted. Simon's defense, however, was not that the payment was a lawful contribution but rather that the demand was never made and the money never received on his behalf. *Id.* at 137-138. Furthermore, the court noted, the entire instruction on extortion included language that required a finding that the defendant had acted "unlawfully" and language that defined extortion under color of right as the "misuse" of public office. Pet. App. 138; see Gov't C.A. Br. 248-249. Particularly "[i]n light of the factual issues framed by the parties' contentions, these passages of the jury charge provide adequate assurance that Simon suffered no prejudice by the erroneous inclusion of the 'pattern of benefits' language from *O'Grady*." Pet. App. 138. The court of appeals was therefore correct in determining that, on the facts of this case and in the overall context of the jury instructions, the challenged portion of the charge does not require reversal.[8]

4. Petitioner Simon claims (90-785 Pet. 24-29) that the district court erred in denying without a hearing his motion for a new trial, which was based on a claim of new evidence concerning government witness Sabino Fogliano. This contention is insubstantial.

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[8] Because the court of appeals found that there was no issue about whether the extorted payments were lawful campaign contributions, this case is unlike *McCormick* v. *United States*, No. 89-1918 (argued Jan. 8, 1991), in which petitioner claimed that particular payments made to him were legitimate campaign contributions. Simon challenges the court of appeals' analysis of the trial record (90-785 Pet. 23), but the court of appeals' reading of the record is well supported and does not merit review.

The newly discovered evidence advanced in support of Simon's new trial motion was that, although Fogliano testified about his own tax evasion and admitted that he had failed to report $600,000 to $800,000 over several years, the full extent of his actual tax evasion was not revealed. After the conclusion of the trial in this case, Fogliano pleaded guilty in New York State court to charges of evading income taxes of $8.5 million. Pet. App. 69-70. Simon argues from this fact that Fogliano lied on the witness stand, that the federal prosecutors probably knew of his perjury, and that, had the jury known the full extent of Fogliano's tax evasion, it may have discounted his testimony and acquitted Simon.

The general standard for granting a new trial based on newly discovered evidence is that the new evidence would probably lead to an acquittal. *United States* v. *Steel*, 759 F.2d 706, 713 (9th Cir. 1985); *United States* v. *Gonzalez*, 748 F.2d 74, 77 (2d Cir. 1984); *United States* v. *Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981), cert. denied, 456 U.S. 946 (1982). If the new trial motion is based on the use of perjured testimony, however, and the government knew or should have known of the perjury, then a new trial should be granted "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976); *United States* v. *Petrillo*, 821 F.2d 85, 88 (2d Cir. 1987).

The district court in this case found that petitioner's motion failed under either of these standards. 705 F. Supp. at 864, 865-866. The court observed that the government had notified the defense that Fogliano was a tax evader before trial, that the government brought out Folgiano's tax evasion and the ongoing state investigation on direct examination, and that the defense pursued the tax evasion on cross-examination. *Id.* at 866. The jury thus clearly knew that Fogliano was a tax evader, and that his crime involved

a substantial amount of money. The district court concluded (*ibid.*):

> It is disingenuous to suggest that had the jury known Fogliano was a bigger tax evader than he was made out to be they would have acquitted Simon of the charges against him. Such evidence, had it been adduced at trial, would have been merely "'*additional* evidence tending *further* to impeach the credibility of a witness whose character had already been shown to be questionable;' it could hardly have transformed the jury's image of [the government's witness] from paragon to knave."

The new evidence was cumulative and related only to the impeachment of the witness, rather than to Simon's guilt or innocence. Moreover, there was abundant independent evidence, apart from the testimony of Fogliano, that supported Simon's conviction. Gov't C.A. Br. 204-205. The district court was therefore correct in finding that the new evidence did not warrant a new trial under either standard.[9]

5. Petitioner Mario Biaggi claims (90-931 Pet. 25-31) that the district court's refusal to order the production of certain documents and the issuance of certain trial subpoenas precluded him from presenting his defense. He sought to subpoena several government officials, including Edwin Meese, who had been a White House official at the time Wedtech was awarded its major government con-

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[9] With regard to Simon's claim that the district court should have held an evidentiary hearing to establish the extent to which the government knew the full amount of Fogliano's tax evasion, the district court found that the claim of government misconduct was entirely speculative, unsupported by any firm evidence, and "wholly insufficient" to require an evidentiary hearing. 705 F. Supp. at 866. Particularly in light of the fact that at the time of trial the state investigation was still in progress, there is no basis for Simon's assertion that the federal prosecutors must have known the exact extent of Fogliano's tax evasion.

tracts, and he sought to obtain documents that would show the involvement of Meese and other officials in obtaining contracts for Wedtech. The "Meese defense" was designed to show that Wedtech already had the aid of senior Republican Executive Branch officials and therefore had no need to bribe a Democratic congressman. Pet. App. 131-133.

The short answer to this contention is that, as the court of appeals explained, petitioner was allowed ample opportunity to present this defense to the jury. The district court's refusal to order production of the requested documents and testimony was well within its discretion to prevent the expansion of an already lengthy trial into cumulative and irrelevant matters. Pet. App. 132. See also 705 F. Supp. at 849. The court of appeals pointed out that the defense was able to establish through the four cooperating witnesses "the considerable role played by Meese in assisting Wedtech in its dealings with the Executive Branch and the substantial payments made to Meese's advisor, lawyer/lobbyist E. Robert Wallach, who received $800,000 and one percent of Wedtech's stock for exercising his influence with Meese." Pet. App. 132. The court of appeals also noted that the prosecution never disputed the allegations of Meese's involvement on behalf of Wedtech. The prosecution argued that Wedtech had unlawfully sought to influence numerous people in both the Executive and Legislative Branches. *Id.* at 132-133. As the district court repeatedly observed, the documents and testimony sought to be compelled by petitioner would at most implicate others in the unlawful dealings with Wedtech; they would not exonerate petitioner. See, *e.g.*, 675 F. Supp. at 811; 674 F. Supp. at 1036-1037.

The handling of discovery requests is generally committed to the discretion of the district court. The record in this case demonstrates that the court did not abuse that discretion in making its rulings and that petitioner suffered no

prejudice to his substantial rights. See *United States* v. *Paiz*, 905 F.2d 1014, 1027 (7th Cir. 1990); *United States* v. *Balk*, 706 F.2d 1056, 1059-1060 (9th Cir. 1983).

6. Petitioner Mario Biaggi also claims error (90-931 Pet. 18-24) in the district court's exclusion of evidence that he asserts would have shown his belief that the Wedtech stock that was issued to his son was in fact his son's property. Specifically, Mario Biaggi proffered the testimony of his daughter-in-law, Richard's wife, that on one occasion Richard offered to use part of the proceeds from sale of the shares of stock to repay a loan from his father. At another time, Richard purportedly offered to make a gift to his father of ten percent of the shares; his father initially declined the offer and agreed to accept the gift only if his accountants could assure him such a transfer would be lawful. Pet. App. 129-130; Gov't C.A. Br. 144.

Mario Biaggi argues that the district court's refusal to allow this testimony deprived him of critical defense evidence; he further argues that the court of appeals departed from its own precedents allowing such state-of-mind evidence when it affirmed the district court's ruling. In fact, as the court of appeals made clear, petitioner himself withdrew his proffer of this evidence, making a tactical decision not to introduce it once he realized that it would open the door to the prosecution's rebuttal evidence showing other occasions on which Biaggi had used his children to mask his own improper transactions. Pet. App. 130. Contrary to petitioner's contention (90-931 Pet. 19 n.3), the record is clear that he disavowed any intention to introduce the evidence. See Gov't C.A. Br. 147-152. As the court of appeals concluded, "[h]aving elected, for understandable tactical reasons, not to press for admission of the evidence to show the Congressman's state of mind, Biaggi cannot complain on appeal about the consequences of his decision." Pet. App. 131.

7. Finally, petitioner Richard Biaggi contends (90-937 Pet. 11-15) that it was error for the district court to find, without holding a so-called *Kastigar* hearing (*Kastigar* v. *United States*, 406 U.S. 441 (1972)), that the government had adequately shown that it did not use the testimony Richard Biaggi gave to a New York state grand jury under a grant of immunity. This claim is incorrect.

The district court explained in a post-trial opinion that it had earlier decided to postpone the *Kastigar* hearing until after trial. After trial, however, the court concluded that the trial had obviated the need for such a hearing. After reviewing Richard Biaggi's immunized grand jury testimony and the trial record, the court found it to be clear that the government's case "was obtained from sources wholly independent of * * * Richard Biaggi's grand jury testimony." 705 F. Supp. at 867. In a thorough discussion of the issue, the court of appeals agreed with the district court that review of the immunized testimony and the trial record fully demonstrated that the government had made no use of Richard Biaggi's immunized testimony. The court emphasized that the charges in this case did not even relate to the immunized testimony. Pet. App. 115-119. No further review of this essentially factual determination is warranted.

As the court of appeals explained, Richard Biaggi's immunized testimony in the state grand jury concerned two episodes of bribery, both involving payments through a company called Portatech, to a General Castellano in the New York National Guard and to Bernard Ehrlich, who was also a general in the National Guard. The charges in this case did not concern the Portatech bribes. Indeed, there was only one brief reference to Castellano in the government's case (described by the court of appeals as "fleeting and inconsequential"), and that reference did not concern any attempt to bribe Castellano. Pet. App. 116-117. Additionally, the government used one Portatech document in

its case (to cross-examine Richard Biaggi's wife about her knowledge of her husband's business dealings), but the document was obtained from Wedtech pursuant to a subpoena issued before Richard Biaggi's grand jury testimony. Pet. App. 117.[10]

In short, the purpose of a *Kastigar* hearing was fully satisfied by the trial court's review of petitioner's grand jury testimony and the entire trial record of this case. From that review, both the district court and the court of appeals were satisfied that the government met its burden of showing that it had not made any use of Richard Biaggi's immunized testimony. That case-specific determination is correct and does not warrant further review.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioner also argued below that his grand jury testimony was indirectly used against him by providing the motivation for the cooperation of the four Wedtech witnesses who testified for the government. The court of appeals properly rejected that claim. As the court explained, the witnesses were questioned extensively at trial about their motivation for cooperating with the government, and none of them testified they were motivated by anything Richard Biaggi had said to the state grand jury. Pet. App. 118-119.

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